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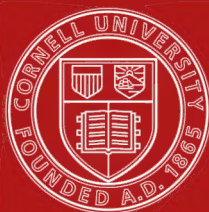
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**The general principles of the law of evi**



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THE GENERAL PRINCIPLES  
OF THE  
LAW OF EVIDENCE

WITH THEIR APPLICATION TO  
THE TRIAL OF CIVIL ACTIONS  
AT COMMON LAW, IN EQUITY  
AND  
UNDER THE CODES OF CIVIL PROCEDURE  
OF THE SEVERAL STATES.  
IN TWO VOLUMES.

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AN APPENDIX TO VOL. II.  
CONTAINS  
THE CODE PROVISIONS OF NEW YORK AND CALIFORNIA.

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BY FRANK S. RICE  
COUNSELOR AT LAW.

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VOLUME I.

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## PREFACE.

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The existing condition of the legal literature expository of this subject, as indicated by the various text-books now before the profession, will afford ample vindication for the appearance of the present work.

Without hypercriticism, it may be safely assumed of Best, Phillips, Taylor and Starkie that they wrote for a generation which has long since passed away. Their text was professedly designed to meet the requirements of a social, professional and commercial condition that was entirely foreign both to the sentiment and emergencies of the present day and to the genius and spirit of our institutions. Their works not only embodied the exact scholarship and the judicial opinion of their day, but also faithfully reflected the attitude of the English bar on this topic during the first half of the present century. But apart from the great lapse of time and the radical change in all material conditions—causes in themselves amply sufficient to impair the usefulness of any text-book whatever—an unfortunate system of alleged annotation in the form of “marginal notes” and cross references, usually in fine type, and by a succession of editors foreign to the author, has been engrafted upon the original text, necessarily without regard to either the logical development of the general theme, or the pertinency of the particular discussion. This had the dual effect of giving bulk and proportion to the volume, and perplexity and delay to the practitioner, until such undue expansion of the system has resulted in a very sturdy protest from bench, bar and commentator alike.

A critic of rare discernment and acknowledged eminence, both as a text-writer and a jurist (Sir James Stephen), has voiced the prevailing opinion as to those various publications and their authors, in the following language:

“All the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections, more or less complete, of all the authorities upon a given subject to which a judge would listen in an

argument in court. Such works often become, under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to have the effect of making the attainment, by direct study, of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference." (*Introduction to Stephen's Digest of the Law of Evidence.*)

The countless intricacies that have arisen from railway expansion, electrical communication, the more general employment of mechanical appliances and other equally radical innovations, are loudly calling for an abandonment of the metaphysical treatment of the various formulas and rationale of evidence as an abstract science, and its consideration with special reference to its practical application to the variant phases of an immense volume of litigation. Of Stephen's Digest it may be said that while it is in every way admirable as a terse statement of general principles, the restrictive treatment his plan imposed excludes its consideration as a repository of applied principles or rules of illustrative application. It is impossible to more than outline the features of a great topic within the compass of such a work.

Of the American authorities, Greenleaf and Wharton, the former, owing to the crude and inceptive condition of our jurisprudence, was confined largely to English precedent for principle and authority. He wrote with rare discernment and classic elegance of diction, but from the standpoint of fifty years ago; and much of the scholarly suggestion and research of his time have become utterly obviated and useless. Dr. Wharton appears to have adopted many of Prof. Greenleaf's limitations, and his very able work is characterized by a decided adherence to common law precedents, metaphysical disquisition, and historical résumé, in which Justinian, Tribonian, Puffendorf and Vattel vie with Nottingham, Hardwicke and the mediæval scholastics in casting obscurity and confusion upon the application of the text to the demands of our modern practice methods. Few lawyers in the press and exigency of a hotly contested case have either the time or disposition to investigate subjects of even great fascination to the antiquary and biblio-



mane, but which, it is respectfully submitted, neither solve perplexities or even afford the faint suggestion of relief.

Mr. Abbott, in the introductory paragraph of his Trial Evidence, indicates the self-imposed limitation the distinguished author has placed upon his incomparable work he says: "In this volume I 'assume' that the reader is familiar with the general principles of the law of evidence." This is a safe postulate with the intellectual Titans of the bar; and to those who are to-day the recognized primates of professional capacity, it may well apply; but what can we "assume" for the vast mass of the rank and file, including those who are just entering upon their professional career, or are struggling through the first years of an arduous and exacting practice, limited as to time and means for the fullest assimilation of such "general principles," to say nothing of the other "readers" who now and then need to *refresh* their "familiarity?"

It is a notorious fact among the American judiciary, a fact sustained by abundant data, that fully four fifths of the cases in the appellate courts allege as matter of reversible error the erroneous reception or rejection of some evidentiary fact that the respective counsel offered to prove. This fact alone is a practical demonstration of the uncertainty and contradiction that prevail in the present law on this topic, and unmistakably indicates the demand for some standard of authority that will assist in harmonizing the discrepancies that pervade the Federal and State decisions.

The progressive and assimilative character of law as a recognized science is best illustrated by the radical innovations that have recently been effected in the rules regulating the production of evidence in civil cases.

Statutory enactment, judicial decision, with new customs and usages, have fastened upon the early maxims of evidence a mass of additional matter that in many instances has quite obscured the original rule, to which it was supposed to sustain some affinity. As typical of this we cite the effect of such legislation as we find embodied in § 829 of the New York Code of Civil Procedure, as to examination of a party in his own behalf, etc. This has been a prolific source of litigation. Its provisions have been substantially re-enacted in nearly all of the Code states, and it is still a never-failing spring of legal agitation and

controversy. So, too, the abrogation of all restrictive regulations as to the competency of witnesses, arising from mental, moral and social disqualification, has effected extended changes in the former rules, while the force and effect of legislative sanction now given to public records under the various recording acts, must be regarded as innovations that have placed many important questions of the early law in new and modified lights.

Again, the radical changes effected by the reformed procedure, the elimination of all distinctions between law and equity in our practice methods, the extended application accorded to the doctrine of *res gestæ*, estoppel and *res adjudicata*, the almost universal use of depositions as effective auxiliaries to evidence, the startling and violent inroads affected by the telegraph, the telephone, the phonograph, with the extensive application of photography in evidence, have placed the frontier line of relevancy far beyond anything that would be recognized by the presiding judge of even twenty years ago. Further, consider the latitude now accorded to the trial court as to limiting the scope and range of cross-examination and the order of proof, the liberality with which certain presumptions are indulged, and the equally generous provisions relating to amendments, and the averment is fully sustained by the whole tenor and trend of modern adjudication, that, under the impulse of present ideas, the courts are disposed to greater freedom and latitude in construing evidence.

Still another formidable deflection from early rule is found in the effort of the federal courts to assimilate their practice to the statutory law in force in the particular State in which they are sitting; this, with the extended discretion accorded to the trial court in the admission of evidence, calls for a correlative increase of care on the part of the appellate court in reviewing evidentiary facts with a view to relieve against such errors as may have affected the substantial rights of the parties to the litigation. This system of reviewing the evidence, on the appeal, has necessitated great care in the preparation for trial, and exacts a discriminating review of the authorities which will best indicate the methods by which the allegations of the pleadings are to be sustained.

So much, as explanatory, in part, of the reasons that have called forth this undertaking. It only remains to add some brief observations on the nature, scope and character of this treatise. It is grounded upon the state and federal decisions and is therefore

distinctively and eminently American. It presents an analysis of the subject in all its branches, and embraces a wide range of authority, as is best evidenced by the fact that nearly ten thousand decisions are cited and discussed. There is nothing whatever speculative or argumentative about the text, but it is rather a somewhat elaborate attempt to state what has been decided—what the law is, not what, in the writer's opinion, the law should be. The authorities cited are believed to enunciate the entire substance of the law tributary to the subject, and they are supposed to faithfully reflect in minute detail, the letter and spirit of modern rules.

In general, the author has preferred to leave any apparent contradiction in the citations without even an attempt at reconciliation, rather than incumber the free movement of the text with expositions that at best must be purely speculative, and that are without the least influence either upon the conscience or discretion of the trial court. The practitioner is best qualified to draw these lines of demarcation and observe the variant nature of the facts, which doubtless will indicate or suggest the reasons for the apparent want of harmony. As a contribution to the legal literature of the period, I disclaim all consideration not merited, but will insist that the undertaking is something more than a mere compilation from the syllabi of reporters, brought together because of a fancied affinity to the general subject. It is a studious attempt to appropriately group and classify the latest utterances of authority upon every proposition that is avowedly or by implication involved in the proper evolution of the text.

As no apology for the work is required or expected, none certainly will be offered. Those whose advanced "personal equation" and mental equipment emancipate them from the need of such an assistant are hardly in a position to resent its appearance if in any way it prove beneficial to others; while those who are disposed to admit the existence of a "long felt want" should not discountenance an attempt, however ineffectual, to supply that want.

While conscious of many deficiencies both of treatment and of style, the work is offered to the profession with the hope that such merits as it may possess will entitle it to indulgent consideration as embodying data that will often assist and never mislead.

It remains to express a proper appreciation of the many courtesies received, during an extended period of preparation, from the editorial staff of the Lawyers' Co-operative Publishing Company.

Particularly am I indebted to Messrs. Robert Desty, Charles A. Ray and S. K. Williams, for much valuable suggestion and matured advice; also to Mr. B. A. Rich for his personal co-operation in the preparation of the elaborate index, upon which depends so much the value of the volumes themselves.

Dec. 1891.

F. S. R.



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# LAW OF EVIDENCE

IN

## CIVIL CASES.

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### VOLUME I.

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#### CHAPTER I.

##### VARIOUS DEFINITIONS OF THE SUBJECT.

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- m. *Satisfactory Evidence.*
- n. *Indispensable Evidence.*
- o. *Conclusive Evidence.*
- p. *Cumulative Evidence.*
- q. *Corroborative Evidence.*

15. *Further Definition of Cumulative Evidence.*

§ 1. **The Subject Defined.**—A critical analysis of the component parts of every judicial decision will disclose the fact that essentially it is nothing more than an adjustment to and application of well recognized and indisputable legal principles to the equities of the controversy as revealed by the facts established. The decision imports the existence of certain facts, and implies that the judicial knowledge of those facts has resulted from, and is inspired by, some information communicated to the trial court which justifies and logically enforces the decree, decision or order rendered. Obviously the most effective method of imparting such information as will warrant the rendition of a final judgment and conclude all parties to the litigation, is to impose upon the parties to the controversy the burden of introducing the necessary information to the attention of the court; and this information so imparted which is the basic principle of the decision rendered is "Evidence," while the rules which dictate the admission or rejection of this evidence,—the method and order in which it is introduced,—the effect accorded it,—the weight assigned to it,—constitute as an entirety what is recognized as the "Law of Evidence."

§ 2. **As Defined by Bentham.**—With the above definition in view we may quote another from a more distinguished source: Evidence is "any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The fact sought to be proved is termed the 'principal fact;' the fact which tends to establish it, 'the evidentiary fact.'" 1 Benth. Jud. Ev. 17, 18.

§ 3. **A Definition by Best.**—The word "proof" seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and as truths differ, the proofs adapted to them differ also. Thus the proofs of a mathematical problem or theorem

are the intermediate ideas which form the links in the chain of demonstration; the proofs of anything established by induction are the facts from which it is inferred, etc.; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents and the like. "Proof" is also applied to the conviction generated in the mind by proof properly so called. Best, Ev. § 10.

§ 4. "Evidence" and "Proof" not Synonymous—**Whately.**—"Evidence" and "proof" are often used indifferently, as synonymous; but the latter is applied, by the most accurate logicians, to the effect of evidence, and not to the medium by which truth is established. Whately, *Logic*, chap. III.; *Schloss v. His Creditors*, 31 Cal. 203 (1866); *Perry v. Dubuque S. W. R. Co.* 36 Iowa, 106 (1872).

§ 5. **Judicial Proof not a Matter of Arbitrary Rule.**—Judicial proof is not a matter of arbitrary rule. Its principles are drawn from the experience and observation of men and should be applied as they are by men in general. *Bell v. Brewster*, 44 Ohio St. 699 (1887).

§ 6. **Matters of Fact are Proved by Moral Evidence Alone.**—The word "evidence," then, in legal acceptance, includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Stark. Ev. 10. None but mathematical truth is susceptible of that high degree of evidence called demonstration, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by moral evidence alone; by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained either from intuition or from demonstration. In the ordinary affairs of life we do not require demonstrative evidence, because it is not consistent with the nature of the subject, and to insist upon it would be unreasonable and absurd. The most that can be affirmed of such things is, that there is no reasonable doubt concerning them. The true question, therefore, in trials of fact, is not whether the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence. Things estab-

lished by competent and satisfactory evidence are said to be proved. Haines' Treatise on Civ. and Crim. Law (12th ed.) 625.

§ 7. **A Further Definition from Best.**—The word "evidence" signifies, in its original sense, the state of being evident, *i. e.*, plain, apparent or notorious. But by an almost peculiar inflection of our language, it is applied to that which tends to render evident or to generate proof. Best, Ev. § 11. This is the sense in which it is commonly used in modern law books, and will be used throughout this work.

§ 8. **Definitions by Various American Courts.**—The only purpose of evidence is to establish what is alleged by one party and denied by the other. *Parkhurst v. McGraw*, 24 Miss. 134. To establish the controverted facts, proof is the end and evidence is the means. Proof establishes the truth. Evidence only tends towards it. Any pertinent and legitimate facts conducing to the proof of a litigated fact are evidence of it, either weaker or stronger, according to their entire character and complexion. *Miles v. Edelen*, 1 Duv. 270. Evidence which tends to prove an issue contributes to its establishment and assists in giving a leaning to the mind in its consideration or determination. That which is directed to an end, however, may not necessarily attain it. It may be received as evidence if it has this tendency, but it is not to be treated as conclusive or as necessarily warranting the fact which it tends to establish. Evidence, however, may be so direct and positive as to amount to proof itself, but in general it consists of facts, which, while they do not necessarily establish the controverted fact, tend to justify the inference of its existence. *Davenport v. Cummings*, 15 Iowa, 219. See Bump, Fraud. Conv. 578.

§ 9. **Bouvier's Summary.**—*Judge* Bouvier, in the fifteenth edition of his Law Dictionary (1888), under the title of *Evidence*, after citing various definitions of the term from well-recognized authorities, says:

"Evidence may be considered with reference to its instruments, its nature, its legal character, its effect, its object and the modes of its introduction.

"The instruments of evidence, in the legal acceptation of the term, are:

"1. Judicial notice or recognition. There are divers things of which courts take judicial notice, without the introduction of

proof by the parties; such as the territorial extent of their jurisdiction, local divisions of their own countries, seats of courts, all public matters directly concerning the general government, the ordinary course of nature, divisions of time, the meanings of words, and, generally, of whatever ought to be generally known in the jurisdiction. If the judge needs information on subjects, he will seek it from such sources as he deems authentic. See 1 Greenl. Ev. chap. 2; Steph. Ev. art. 58.

“2. Public records; the registers of official transactions made by officers appointed for the purpose; as, the public statutes, the judgments and proceedings of courts, etc.

“3. Judicial writings; such as inquisitions, depositions, etc.

“4. Public documents having a semi-official character; as, the statute books published under the authority of the government, documents printed by the authority of Congress, etc.

“5. Private writings; as deeds, contracts, wills.

“6. Testimony of witnesses.

“7. Personal inspection, by the jury or tribunal whose duty it is to determine the matter in controversy; as, a view of the locality by the jury, to enable them to determine the disputed fact or the better to understand the testimony, or inspection of any machine or weapon which is produced in the cause.

“There are rules prescribing the limits and regulating the use of these different instruments of evidence, appropriate to each class.

“In its nature, evidence is direct, or presumptive, or circumstantial.

“Direct evidence is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

“It is that evidence which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. 1 Phill. Ev. 116; 1 Stark. Ev. 19. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense; all other evidence is presumptive; but, in common acceptance, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.”

§ 10. **Parker's Definition.**—An admirable definition that seems to have escaped notice is that given by Professor Parker in his lectures on Medical Jurisprudence in Dartmouth College: "That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence."

§ 11. **Exhaustive Analysis of Sir James Stephen.**—From the scholarly attainments and judicial reputation of *Sir James Stephen* we had a right to expect, and have received, definition, criticism and exegesis upon evidentiary matters that in many respects exhaust the subject and leave but little room for commentary or demur. From the introductory chapter of his celebrated Digest I excerpt the following:

"The law of evidence is that part of the law of procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

"I. What facts may, and what may not, be proved in such cases;

"II. What sort of evidence must be given of a fact which may be proved;

"III. By whom and in what manner the evidence must be produced by which fact is to be proved.

"I. The facts which may be proved are facts in issue, or facts relevant to the issue.

"Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

"Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

"A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

"Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the law of evidence except in certain cases:



"1. Facts similar to, but not specifically connected with, each other. (*Res inter alios actæ.*)

"2. The fact that a person not called as a witness has asserted the existence of any fact. (Hearsay.)

"3. The fact that any person is of opinion that a fact exists. (Opinion.)

"4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (Character.)

"To each of those four exclusive rules there are, however, important exceptions, which are defined by the law of evidence.

"II. As to the manner in which a fact in issue or relevant fact must be proved.

"Some facts need not be proved at all, because the court will take judicial notice of them, if they are relevant to the issue.

"Every fact which requires proof must be proved either by oral or by documentary evidence.

"Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct; that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

"Documentary evidence is either primary or secondary.

"Primary evidence is the document itself produced in the court for inspection.

"Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

"Whenever any public or private transaction has been reduced to a documentary form, the document in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

"III. As to the person by whom, and the manner in which, the proof of a particular fact must be made.

"When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed,

either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

“The witnesses by whom a fact is to be proved must be competent. With very few exceptions everyone is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

“The evidence must be given upon oath, or, in certain excepted cases, without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

“This brief statement will show what I regard as constituting the law of evidence properly so called.”

**§ 12. A Definition from Wait's Law and Practice.**—That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of evidence. When such evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof. But the parties to an action are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute; if such a latitude were permitted, evidence might frequently be brought forward which would lead rather to error than to truth, the attention of the court or jury might be diverted by the introduction of irrelevant or immaterial evidence, and the investigation extended to a most inconvenient length. In order to guard against these evils, the law has provided certain rules for limiting and regulating the admissibility of evidence. Some of these rules are statutory enactments, but the great majority of them are judicial decisions, which are founded upon convenience and the promotion of justice. 3 Wait, Law and Pr. (5th ed. 1885) 374.

**§ 13. Wharton's Definition.**—Dr. Wharton says (§ 3): “Evidence includes the reproduction before the determining tribunal, of the admissions of the parties, and of facts relevant to the issue. Proof, in addition, includes presumptions either of law or fact,

and citations of law. See *Harvey v. Smith*, 17 Ind. 272. Proof, in this sense, comprehends all the grounds on which rests assent to the truth of a specific proposition. Evidence, on the other hand, is adduced only by the parties, through witnesses, documents or inspection; proof may be adduced by counsel in argument, or by the judge in summing up a case."

§ 14. **The Statutory Definition of the California Code of Civil Procedure.**—The California Code of Civil Procedure, as adopted in 1877, contains a classification of the rules of evidence and a series of definitions thereunder that embody the accumulated experience of nearly thirty years' practice under the reformed procedure. Sections 1823–1839 express and typify the judicial sentiment of the American judiciary upon the subject matter of which they treat, and illustrate the dominant view that long experience and actual practical application have both suggested and enforced. While it is not claimed that these Code provisions possess any extraterritorial force, still the substantial unanimity with which they have been adopted in many of the Western States, together with their obvious merit and conciseness, are sufficient excuse for their reproduction in this instance. After an exhaustive survey of the entire subject in so far as it relates to the classification and definition of the various grades of evidence, it is safe to affirm that no tabulation is more expressive or complete, and none attempts the least approach to these enactments, either in precision or conciseness. I append the various provisions *in extenso*, and affirm their wide acceptance and indorsement by eminent authority.

a. **Evidence.**—Sec. 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact.

b. **Proof.**—Sec. 1824. Proof is the effect of evidence, the establishment of a fact by evidence.

c. **Law of Evidence.**—Sec. 1825. The law of evidence, which is the subject of this part of the Code, is a collection of general rules established by law,—

1. For declaring what is to be taken as true without proof;
2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,
3. For the production of legal evidence;

4. For the exclusion of whatever is not legal;

5. For determining, in certain cases, the value and effect of evidence.

**d. Degree of Certainty Required to Establish Facts.**—Sec. 1826. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

**e. Four Kinds of Evidence.**—Sec. 1827. There are four kinds of evidence:

1. The knowledge of the court;

2. The testimony of witnesses;

3. Writings;

4. Other material objects presented to the senses.

**f. Degrees of Evidence.**—Sec. 1828. There are several degrees of evidence:

1. Primary and secondary;

2. Direct and indirect;

3. Prima facie, partial, satisfactory, indispensable and conclusive.

**g. Primary Evidence.**—Sec. 1829. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents.

**h. Secondary Evidence.**—Sec. 1830. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents.

**i. Direct Evidence.**—Sec. 1831. Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: If the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it is direct.

**j. Indirect Evidence.**—Sec. 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish

that fact, but which affords an inference or presumption of its existence. For example: A witness proves an admission of the party to the fact in dispute; this proves a fact, from which the fact in dispute is inferred.

**k. Prima Facie Evidence.**—Sec. 1833. Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: The certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record.

**l. Partial Evidence.**—Sec. 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: On an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute.

**m. Satisfactory Evidence.**—Sec. 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

**n. Indispensable Evidence.**—Sec. 1836. Indispensable evidence is that without which a particular fact cannot be proved.

**o. Conclusive Evidence.**—Sec. 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: The record of a court of competent jurisdiction cannot be contradicted by the parties to it.

**p. Cumulative Evidence.**—Sec. 1838. Cumulative evidence is additional evidence of the same character to the same point.

**q. Corroborative Evidence.**—Sec. 1839. Corroborative evidence is additional evidence of a different character to the same point.

§ 15. **Further Definitions of Cumulative Evidence.**—Cumulative evidence has been defined as evidence of the same kind to the same point. *Parker v. Hardy*, 24 Pick. 248 (1837), Morton, J.

“According to my understanding of cumulative evidence, it

means additional evidence to support the same point, and which is of the same character with evidence already produced." *Ch. J. Savage*, in *People v. New York Super. Ct.* 10 Wend. 285 (1833).

Evidence which simply repeats, in substance and effect, or adds to, what has been testified to. *Parshall v. Klinck*, 43 Barb. 212 (1864), *E. D. Smith, J.*

Evidence which merely multiplies witnesses to a fact before investigated, or only adds other circumstances of the same general character. *Waller v. Graves*, 20 Conn. 310, 311 (1850). See also *Olmstead v. Hill*, 2 Ark. 353; *Glidden v. Dunlap*, 28 Me. 383; *Fleming v. Hollenback*, 7 Barb. 278; *Anderson*, Law Dict. p. 422.

## CHAPTER II.

### JUDICIAL NOTICE.

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§ 16. **Present Attitude of Judicial Authority upon This Subject as Defined by Chief Judge Hunt.**—The present attitude of judicial authority upon this important topic of the law of evidence is indicated in a sententious utterance of the New York Court of Appeals in an opinion by *Chief Judge* Hunt. It is an epitome of the legal sentiment of this country, and through its logical inferences and implications it can be made to embrace every rule pertinent to this discussion. After an interesting résumé of the authorities implicated with this question, his honor summarizes the conclusion in the following terms: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction, and where the memory of the judge is at fault, he may resort to such documents



of reference as may be at hand and he may deem worthy of confidence." *Swinerton v. Columbian Ins. Co.* 37 N. Y. 174.

§ 17. **Definition by Sir James Stephen.**—*Sir* James Stephen crystalized the wealth of English adjudication upon this subject in art. 59 of his Digest. The expression seems somewhat involved when contrasted with the singular lucidity of the paragraph above quoted; still it is a safe embodiment of the existing law and well merits reproduction in our text: "No evidence of any fact of which the court will take judicial notice need be given by the party alleging its existence, but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or document or book of reference for his satisfaction, in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling on him to take such notice produces any such document or book of reference."

§ 18. **Definition by Chief Justice Taney in a Celebrated Case.**—The Supreme Court of the United States has given expression to similar views, and the opinion of *Chief Justice* Taney, in *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274, should be consulted for further elucidation. The tenor and trend of judicial comment is sufficiently indicated in the somewhat extended résumé of the topic this chapter attempts, and it may be affirmed as an indisputable proposition that both the state and federal courts are in entire accord as regards the salient features of the rules that now obtain in reference to this subject.

§ 19. **View of the Subject by United States Courts.**—United States courts will take judicial notice of the public statutes of the several States (*Elwood v. Flannigan*, 104 U. S. 562, 26 L. ed. 842); of the laws of every State and Territory in the United States. *Breed v. Northern Pac. R. Co.* 35 Fed. Rep. 642. They, as well as the supreme court on appeal or error from that court, take judicial notice of the laws of every State of the Union. *Fourth Nat. Bank of New York v. Francklyn*, 120 U. S. 747, 30 L. ed. 825; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

Although the supreme court, in the exercise of its appellate jurisdiction from the lower courts of the United States, takes judicial notice of the laws of all the States, yet, upon error to the highest court of a State, it takes judicial notice of the laws of that State only—the laws of the other States being known to the

court below only as facts to be proved as such. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535; *Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629. It will not take judicial notice of the laws of another State, unless the courts of the State from which the case is brought up do so. *Ibid.*

The supreme court will take judicial notice of Legislative Acts establishing a territorial government. *Brown v. Colorado*, 106 U. S. 95, 27 L. ed. 132.

The Supreme Court of the United States will take judicial notice of the persons who preside over the Patent Office. *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 30, 15 L. ed. 27.

It notices judicially state laws defining the limits of a city, but not on a demurrer. *Griffing v. Gibb*, 67 U. S. 2 Black, 519, 17 L. ed. 353.

The United States circuit courts will take judicial notice of the laws of the several States, applicable to causes depending before them. *Merrill v. Dawson*, 1 Hemp. 563; *Jones v. Hays*, 4 McLean, 521; *Jasper v. Porter*, 2 McLean, 579. They will take judicial notice of the authority given by a general and public Act of the Legislature of a State. *Smith v. Tallapoosa County*, 2 Woods, 574; *Butler v. Robinson*, 75 Mo. 192.

## § 20. View of the Subject by State Courts.

**a. Jurisdiction and Authority of Courts.**—Courts will take judicial notice that tribunals are established in the several States for the adjudication of controversies and the ascertainment of rights. *Dozier v. Joyce*, 8 Port. (Ala.) 303.

The court will take judicial cognizance of the external boundary lines of its jurisdiction, and that a crime committed at a place on an Indian reservation within such boundary lines is within the jurisdiction of the court (*United States v. Brave Bear*, 3 Dak. 34); of the decision of the court in fixing the boundaries of counties (*Cash v. State*, 10 Humph. 111); that a court is a court of record. *Morse v. Hewett*, 28 Mich. 481.

The court will take judicial notice of who are its officers (*Norvell v. McHenry*, 1 Mich. 227; *Dyer v. Last*, 51 Ill. 179); of who is its clerk (*Hammann v. Mink*, 99 Ind. 279); but not those of other courts. *Morse v. Hewett*, 28 Mich. 481; *Norvell v. McHenry*, 1 Mich. 227.

It will take judicial notice of all persons who have been

duly appointed deputies by its clerk, where such appointments must be proved by the court (*State v. Barrett*, 40 Minn. 65); and of signatures of its officers as such (*Alderson v. Bell*, 9 Cal. 315); that a person present in the grand jury room was a duly appointed assistant United States district attorney. *People v. Lyman*, 2 Utah, 30.

Territorial courts are bound to know the officers, and enforce the judgments, of United States courts. *Buford v. Hickman*, 1 Hemp. 232.

The appellate courts should take notice of the inferior courts, and who are their judges (*Tucker v. State*, 11 Md. 322; *Ex parte Peterson*, 33 Ala. 74; *Kilpatrick v. Com.* 31 Pa. 198); of the jurisdiction of the county court. *Meshke v. Van Doren*, 16 Wis. 319.

Courts must take judicial notice of their authority. *Platter v. Elkhart County*, 1 West. Rep. 246, 103 Ind. 360.

The California Supreme Court takes judicial notice of the rules of the district courts. *Cutter v. Caruthers*, 48 Cal. 178.

When the official acts of a justice of the peace are offered in evidence in a county other than that where he resides, the official character of the justice must be certified by the proper officer. *Chambers v. People*, 5 Ill. 351.

**b. Terms of Courts.**—The Supreme Court of a State should take notice of the time prescribed by law for holding the terms of the various courts of the State. *Lindsay v. Williams*, 17 Ala. 229; *State v. Hammet*, 7 Ark. 492; *Morgan v. State*, 12 Ind. 448; *Gilliland v. Sellers*, 2 Ohio St. 223; *Pugh v. State*, 2 Head, 227; *Buckinghouse v. Gregg*, 19 Ind. 401; *Williams v. Hubbard*, 1 Mich. 446.

It should take notice of what is the twentieth judicial day of the court below next succeeding a certain other day (*Lewis v. Wintrobe*, 76 Ind. 13); that the date on which a judgment by default was recorded was not a day of a term such that the same was not prematurely rendered (*Bethune v. Hale*, 45 Ala. 522); of the history of a country as to the times of holding courts, and as to the seat of justice (*Ross v. Austill*, 2 Cal. 183); of the different terms of a circuit court of a county (*Dorman v. State*, 56 Ind. 454), and of their duration (*Spencer v. Curtis*, 57 Ind. 221); of the commencement and duration of the term of the circuit

court, and of the coincidence of the days of the week and month (*Rodgers v. State*, 50 Ala. 102); that the circuit court should not have been in session so as to find an indictment at the time stated (*McGinnis v. State*, 24 Ind. 500); that terms of the district court were held at the times prescribed by law. *Davidson v. Peticolas*, 34 Tex. 27.

**c. Court Proceedings.**—Courts will take judicial notice of all prior proceedings in the case (*State v. Bowen*, 16 Kan. 475); that the case before the court had connection with one formerly decided by it (*Banks v. Burnam*, 61 Mo. 76); of the existence before the court of a prosecution for crime against one called as juror (*State v. Jackson*, 35 La. Ann. 769); of a judgment of the supreme court (*Minor v. Stone*, 1 La. Ann. 283); of the fact that a former adjudication has been reversed. *Poolé v. Seney*, 70 Iowa, 275.

On a second appeal the court will judicially know what attorneys have appeared in the cause. *Symmes v. Major*, 21 Ind. 443.

The appellate court will take judicial notice of the date of the making of an order made at a subsequent term of the court, although this last does not appear upon the record. *Fredericks v. Davis*, 6 Mont. 460.

State courts cannot, however, take judicial notice of proceedings pending in federal courts (*Vassault v. Seitz*, 31 Cal. 225; *Haber v. Klauberg*, 3 Mo. App. 342); as, that proceedings in bankruptcy had been instituted pending suit. *Esterbrook S. P. Mfg. Co. v. Ahern*, 30 N. J. Eq. 341.

Courts cannot take judicial notice of their own motion of the pendency of another action before them (*Lake Merced Water Co. v. Cowles*, 31 Cal. 215); nor of the fact that an affidavit of a party had been admitted in another cause, to which he was not a party (*Baker v. Mygutt*, 14 Iowa, 131); nor of a conviction or *nol. pros.* (*State v. Edwards*, 19 Mo. 674); nor that a will was revoked pending other proceedings. *Daniel v. Bellamy*, 91 N. C. 78.

Whether an appellate court will take judicial notice of the rules of the inferior courts, see *Contee v. Pratt*, 9 Md. 67; *Cherry v. Baker*, 17 Md. 75; *Scott v. Scott*, 17 Md. 78.

The facts left in issue, being facts of which the court could take judicial notice, are deemed part of the pleadings and not matter for evidence. *Kendall v. San Juan S. Min. Co.* 9 Colo. 349.

The court will take judicial notice of the city charter provision in relation to jurors. *Hildreth v. Troy*, 2 Cent. Rep. 273, 101 N. Y. 234.

**d. Court Records.**—A court takes judicial notice of its own records (*Taylor v. Adam*, 2 West. Rep. 827, 115 Ill. 570; *Lambeth v. Sentell*, 38 La. Ann. 691; *National Bank of Monticello v. Bryant*, 13 Bush, 419; *Robinson v. Brown*, 82 Ill. 279; *Platter v. Elkhart County*, 1 West. Rep. 246, 103 Ind. 360); of its own record and proceedings upon the former writ of error (*Brucker v. State*, 19 Wis. 539), but not of the record in another case (*People v. De La Guerra*, 24 Cal. 73); of its own judgment in a suit which was virtually a portion of the same record (*Farrar v. Bates*, 55 Tex. 193); of the genuineness of its own records and of the signatures of its own officers. *State v. Postlewait*, 14 Iowa, 446; *State v. Schilling*, 14 Iowa, 455.

The minutes of a court are in the nature of a citation, and need not be offered in evidence, as they prove themselves. *State v. Lazarus*, 39 La. Ann. 142.

An order of the court entered upon the minutes is a part of the record of the case. *Pagett v. Curtis*, 15 La. Ann. 451.

Courts take judicial notice of the seal of a state court (*De Sobry v. De Laistre*, 2 Har. & J. 191; *Mangun v. Webster*, 7 Gill, 78; *Com. v. Snowden*, 1 Brewst. 218); of its clerk's indorsement of date of filing complaint. *Yell v. Lane*, 41 Ark. 53.

### § 21. Time in Its Relations to Judicial Notice.

**a. Facts Stated in the Almanac.**—Courts will take judicial notice of the facts stated in the almanac (*Reed v. Wilson*, 41 N. J. L. 29); of days of the week as shown by the almanac (*Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674); of the days of the week on which particular days of the month fall (*Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209); that a particular date falls on Sunday (*McIntosh v. Lee*, 57 Iowa, 356), and that it is a non-judicial day (*Ecker v. New Windsor First Nat. Bank*, 1 Cent. Rep. 476, 64 Md. 292); of the recurrence of the day on which the general election is held. *Ellis v. Reddin*, 12 Kan. 306.

Judicial notice will be taken of the time the moon rises and sets on the several days of the year (*Agar v. Tibbets*, 46 Hun, 52), and when the sun rose on a certain day. *People v. Chee Kee*, 61 Cal. 404.

Courts will not take judicial notice of the time of the creation of new counties (*Buckinghouse v. Gregg*, 19 Ind. 401); nor of the time of holding elections in another State (*Taylor v. Rennie*, 35 Barb. 272); nor that driving cattle at certain seasons renders them liable to communicate disease (*Bradford v. Floyd*, 80 Mo. 207); nor when the pasturing season closes. *Gove v. Downer*, 3 New Eng. Rep. 463, 59 Vt. 139; *Olive v. State*, 4 L. R. A. 35, 86 Ala. 88.

**b. The Course of Nature.**—Courts will take judicial notice, from time of ancestor's death, that children arrived at full age before suit commenced. *Floyd v. Johnson*, 2 Litt. 109.

Courts are bound to notice the magnetic variation from the true meridian. *Bryan v. Beckley*, Litt. Sel. Cas. 91.

They will take notice of facts of unvarying occurrence, but not of the vicissitudes of climate or of the seasons (*Dixon v. Nicholls*, 39 Ill. 372); of the course of the seasons and of husbandry (*Ross v. Boswell*, 60 Ind. 235); that the end of the calendar year is long after the season for gathering a crop (*Brown v. Anderson*, 77 Cal. 236); the succession of the seasons, as in relation to vegetables and animals (*Patterson v. M'Causland*, 3 Bland, Ch. 69); of the seasons and of the general course of agriculture, crops matured so as to be severed (*Floyd v. Ricks*, 14 Ark. 286); of the fact that cotton is not planted until after the month of January (*Wetzler v. Kelly*, 83 Ala. 440); that a mortgage made in January, upon a cotton crop, is upon a crop not yet in being (*Tomlinson v. Greenfield*, 31 Ark. 557); that the natural watercourses in the State have all decreased in volume, and many of them have been dried up, by the cultivation and clearing of the country (*Hilliker v. Coleman*, 73 Mich. 170); of the navigability of the streams (*Neaderhouser v. State*, 28 Ind. 257); that the capacity of streams to float logs and lumber has been greatly increased by dams (*Tewksbury v. Schulenberg*, 41 Wis. 584); that the tide ebbs and flows. *Whitney v. Gauche*, 11 La. Ann. 432.

§ 22. **Place in Its Relations to Judicial Notice.**—The court takes judicial notice that St. Louis and Chicago are great marts of trade for stock (*White v. Missouri Pac. R. Co.* 2 West. Rep. 154, 19 Mo. App. 400); of the distance between well-known cities in the United States, and of the ordinary speed of railway trains between the same (*Pearce v. Langfit*, 101 Pa. 507, 47 Am. Rep. 737); and the situation of a foreign town, and that a bar exists in the river,

which vessels cannot cross (*The Peterhoff*, Blatchf. Prize Cas. 463); of the fact that a certain country joins another, and that there are facilities for communication by railroad and telephone between two certain places (*Evans v. Kilby*, 81 Ga. 278); of the distance of a place from the seat of government (*Hoyt v. Russell*, 117 U. S. 401, 29 L. ed. 914); of the result of an election on the question of the removal of a county seat (*Andrews v. Knox County*, *Suprs.* 70 Ill. 65); of the limits of the county and of the fact that the place proved was within such limits (*Indianapolis & C. R. Co. v. Case*, 15 Ind. 42); of the lines of counties and towns embraced therein (*Ham v. Ham*, 39 Me. 263; *State v. Jackson*, 39 Me. 291; *Brown v. Elms*, 10 Humph. 135); of the county in which a town created by law is situated. *Martin v. Martin*, 51 Me. 366; *Vanderwerker v. People*, 5 Wend. 530; *Hoffman v. State*, 12 Tex. App. 406. Compare *Clayton v. May*, 67 Ga. 769.

Proof that a crime was committed in Chicago is proof that it was committed in Cook County, judicial notice being taken that Chicago is in Cook County. *Sullivan v. People*, 11 West. Rep. 566, 122 Ill. 385.

Notice will be taken of the towns existing within the State (*Saukville v. State*, 69 Wis. 178; *People v. Waller*, 14 West. Rep. 435, 70 Mich. 237); of the fact that a town in Texas is situated in a county of which it is the county seat. *Carson v. Dalton*, 59 Tex. 500.

The court knows judicially that there is a town of the County of Wilkinson named Woodville, and that there is but one. *Morgan v. State*, 64 Miss. 511. When a crime is committed in an incorporated town, the court will notice in what county such town is situated. *State v. Reader*, 60 Iowa, 527.

But courts will not take judicial notice of the existence of a town of a certain name in another State (*Riggin v. Collier*, 6 Mo. 568; *Whitlock v. Castro*, 22 Tex. 108; *Woodward v. Chicago & N. W. R. Co.* 21 Wis. 309; *Richardson v. Williams*, 2 Port. (Ala.) 239); that a certain court-house is in a particular county (*Vivian v. State*, 16 Tex. App. 262); nor whether a particular locality is within a county (*Boston v. State*, 5 Tex. App. 383); nor of the local situation and distances of places in a county (*Goodwin v. Appleton*, 22 Me. 453; *State v. Quait*, 3 West. Rep. 275, 20 Mo. App. 405); nor that a particular town is in a certain county (*Clayton v. May*, 67 Ga. 769. *Contra*, if the fact is recognized by

statute. *Hoffman v. State*, 12 Tex. App. 406; *Latham v. State*, 19 Tex. App. 305. *Contra*, as to a city. *Schilling v. Territory*, 2 Wash. 283; or as to the locality of streets and avenues and their termini and the number of houses thereon (*People v. Callahan*, 60 How. Pr. 372); or as to the locality of a justice's office, or the number of a certain street (*Allen v. Scharringhausen*, 8 Mo. App. 229); or as to the place of intersection of a city street (*Pennsylvania Co. v. Frana*, 13 Ill. App. 91); or that a certain building in a city is situated in a certain ward (*Schaale v. Wasey*, 14 West. Rep. 650, 70 Mich. 414); or as to city plats or location of city lands (*Cicotte v. Anciaux*, 53 Mich. 227); or as to direction of streets of a city. *Breckenridge v. American Cent. Ins. Co.* 4 West. Rep. 565, 87 Mo. 62; *Dougherty v. People*, 14 West. Rep. 359, 124 Ill. 557.

Where land was shown to have been originally included within the San José military reservation, but granted by the Act of July 1, 1870, to San Francisco in trust, and afterwards conveyed to a beneficiary, the court will not take judicial notice that the land was not within such reservation (*Palmer v. Galvin*, 72 Cal. 183); nor that certain land is not subject to location. *Wilcox v. Jackson*, 109 Ill. 261.

### § 23. Corporations and Corporate Officials.

**a. Private Corporations.**—The statute incorporating a company being a public law, the court is bound to take judicial notice of its organization and existence. *Corington Drawbridge Co. v. Shepherd*, 61 U. S. 20 How. 227, 15 L. ed. 896; *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 1 West. Rep. 247, 104 Ind. 97.

An Act of incorporation containing a provision that it shall not be considered as a public Act must be noticed without being specially pleaded, as would be necessary if the Act were private. *Beaty v. Knowler*, 29 U. S. 4 Pet. 152, 7 L. ed. 813; *Cincinnati, H. & I. R. Co. v. Clifford*, 13 West. Rep. 384, 113 Ind. 460; *Butler v. Robinson*, 75 Mo. 192.

In Iowa, Maine and Massachusetts judicial notice is taken of all Acts of incorporation. *Durham v. Daniels*, 2 G. Greene, 518; *State v. McAllister*, 24 Me. 139; *Jones v. Fales*, 4 Mass. 245.

In Alabama, New Jersey and North Carolina charters of private corporations are not judicially noticed. *Montgomery City Council v. Montgomery & W. Pl. Road Co.* 31 Ala. 76; *Perdicaris v. Tren-*



*ton City Bridge Co.* 29 N. J. L. 367; *Carrow v. Washington Toll Bridge Co.* Phill. L. 118; *Drake v. Flewellen*, 33 Ala. 106.

The existence of corporations created in other States will not be recognized by the Nevada courts (*State v. McCullough*, 3 Nev. 202); otherwise in Michigan. *Chapman v. Colby*, 47 Mich. 46.

Bank charters are public Acts, and it is the duty of courts to take judicial notice of them (*Davis v. Bank of Fulton*, 31 Ga. 69; *Buell v. Warner*, 33 Vt. 570; *Bank of Newberry v. Greenville & C. R. Co.* 9 Rich. L. 495); and that the Ohio Insurance Company was by public law a bank of discount and deposit. *Gordon v. Montgomery*, 19 Ind. 110.

Courts will take judicial notice of the expiration of a bank charter (*Terry v. Merchants & P. Bank*, 66 Ga. 177); of the fact that a corporation is authorized by an Act of Congress to build and maintain a bridge over navigable waters (*Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.* 37 Fed. Rep. 129); that a Free Mason lodge is a charitable or eleemosynary body (*Burdine v. Grand Lodge of Alabama*, 37 Ala. 478); that a railroad company is a corporation (*Baltimore & O. R. Co. v. Sherman*, 30 Gratt. 602); of general laws concerning the incorporation of railways. *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275; *Hall v. Brown*, 58 N. H. 93.

Special charters to particular railways have been held to be public (*Wright v. Hawkins*, 28 Tex. 452), and private. *Ohio & I. R. Co. v. Ridge*, 5 Blackf. 78; *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 413; *Hildreth v. Troy*, 2 Cent. Rep. 274, 101 N. Y. 234.

Courts will take judicial notice of a railroad charter, published with other legislative enactments (*Hall v. Brown*, 58 N. H. 93); of the authority of a railroad superintendent to receive nor refuse cord wood (*Sacalaris v. Eureka & P. R. Co.* 18 Nev. 155); of the names of chartered companies. *Jackson v. State*, 72 Ga. 28.

But courts will not judicially notice private incorporation Acts, as a Toll-Bridge Act (*Carrow v. Washington Toll-Bridge Co.* Phill. L. 118); nor private plank-road corporations (*Danville & W. L. Pl. Road Co. v. State*, 16 Ind. 456. See *Russell v. Branham*, 8 Blackf. 277); nor the charter of a railroad company (*Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 413), or of a savings bank (*Mandere v. Bonsignore*, 28 La. Ann. 415); nor the existence of ferries (*State v. Wise*, 7 Ind. 645); nor city ordinances (*Apitz v. Missouri Pac. R. Co.* 17 Mo. App. 419; *Wisdom v.*

*Wabash, St. L. & P. R. Co.* 1 West. Rep. 447, 19 Mo. App. 324); nor that a bank in another State is insolvent (*Market Nat. Bank v. Pacific Nat. Bank*, 27 Hun, 465); nor a private corporate seal. *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35.

**b. Public Corporations.**—Courts will take judicial notice of the charter of a municipal corporation created by an Act declared to be public. *Worley v. Columbia*, 4 West. Rep. 343, 88 Mo. 106; *Fauntleroy v. Hannibal*, 1 Dill. 118.

Courts will take judicial notice of the charters of cities or the laws under which they are incorporated (*Stier v. Oskaloosa*, 41 Iowa, 353); of the incorporation Act of a city or town (*Hard v. Decorah*, 43 Iowa, 313); of a city charter, as a public Act, and of the municipal jurisdiction and powers in general (See *Case v. Mobile*, 30 Ala. 538; *Payne v. Treadwell*, 16 Cal. 220; *Terry v. Milwaukee*, 15 Wis. 490; *Alexander v. Milwaukee*, 16 Wis. 247; *State v. Sherman*, 42 Mo. 210. But see *Apitz v. Missouri Pac. R. Co.* 17 Mo. App. 419; *Wisdom v. Wabash, St. L. & P. R. Co.* 1 West. Rep. 447, 19 Mo. App. 324); of a village charter (*Winooski v. Gokey*, 49 Vt. 282); of the Act of the Legislature incorporating the town, city or village, and of the county within which the same is situated. *Beasley v. Beckley*, 28 W. Va. 81.

The supreme court will take judicial notice of the fact that a county has adopted township organization (*Rock Island County v. Steele*, 31 Ill. 543); that a certain village is not incorporated. *French v. Barre*, 2 New Eng. Rep. 807, 58 Vt. 567.

Evidence that a town has assumed to act as a village incorporation is sufficient to warrant judicial notice of the change. *Doyle v. Bradford*, 90 Ill. 416. See *Tilford v. Woodbury*, 7 Humph. 190; *State v. Murfreesboro*, 11 Humph. 217; *Swain v. Comstock*, 18 Wis. 463.

An Act relating only to the powers of a single municipal corporation is in its nature public. *Fauntleroy v. Hannibal*, 1 Dill. 118.

Courts will take judicial notice of old and well-known streets of a city and that the streets of a city are public highways (*State v. Ruth*, 14 Mo. App. 226; *Whittaker v. Eighth Ave. R. Co.* 5 Robt. 650), but not of the width of streets or sidewalks (*Porter v. Waring*, 69 N. Y. 250); of the powers of a city to improve streets (*Macey v. Titcombe*, 19 Ind. 135); of the duties and powers of the trustees prescribed by general law. *State v. Bohlecke* (Mo.) 4 West. Rep. 734.

But courts will not take judicial notice of the incorporation of towns under a privilege statute (*Temple v. State*, 15 Tex. App. 304); or that a particular town has incorporated under a general law (*Hopkins v. Kansas City, St. J. & C. B. R. Co.* 79 Mo. 98); or of regulations of the canal board. *Palmer v. Aldridge*, 16 Barb. 131.

**c. Public Officers.**—Courts will take judicial notice of the character and acts of the collector and deputy collector of the internal revenue. *Lerch v. Snyder*, 2 Cent. Rep. 538, 112 Pa. 161.

Courts will take judicial notice of the official character of public officers (*Brackett v. People*, 1 West. Rep. 616, 115 Ill. 29); of a law passed to enable a particular officer to qualify (*State v. Jarrett*, 17 Md. 309); of the official character of an alderman (*Fox v. Com.* 81\* Pa. 511); of a construction given by the administrative department of the State to statutes fixing the compensation of officers (*State v. Harrison*, 116 Ind. 300); if necessary to support the jurisdiction, that the salary of the office exceeds \$100. *McKinney v. O'Connor*, 26 Tex. 5.

Courts will take judicial notice of the civil officers in the counties in which they hold their sittings (*Theilmann v. Burg*, 73 Ill. 293; *Dyer v. Flint*, 21 Ill. 80); as to who fill county offices within their jurisdiction, and of the genuineness of their signatures (*Wetherbee v. Dunn*, 32 Cal. 106; *Templeton v. Morgan*, 16 La. Ann. 438); and of those of such deputies as the law authorizes (*Himmelman v. Hoadley*, 44 Cal. 215; *Scott v. Jackson*, 12 La. Ann. 640); but not of one who may hold the office of deputy sheriff (*Land v. Patteson*, Minor (Ala.) 14; *State Bank v. Curran*, 10 Ark. 142), or constable (*Broughton v. Blackman*, 1 N. Chip. (Vt.) 109), or deputy marshal. *Ward v. Henry*, 19 Wis. 76.

Courts take judicial notice of the authority and signature of a constable (*Cannon v. Cannon*, 66 Tex. 682), but not of an attorney (*Masterson v. LeClaire*, 4 Minn. 163); of the appointment or election of sheriffs as well as of other executive and administrative officers (*Thompson v. Haskell*, 21 Ill. 215; *Alexander v. Burnham*, 18 Wis. 199; *Ingram v. State*, 27 Ala. 17); that a tax collector duly appointed is a sheriff under the Act of June 16, 1840 (*Burnett v. Henderson*, 21 Tex. 588); of the time at which a sheriff's term of office expired (*Ragland v. Wynn*, 37 Ala. 32); that the trustee of the civil, is also trustee of the school, township (*Inglis v. State*, 61 Ind. 212); of the legal time for the sessions of

boards of county commissioners (*Collins v. State*, 58 Ind. 5); that one who signs as "notary public" is a notary for the county (*Stoddard v. Sloan*, 65 Iowa, 680); of the notarial certificate as proof of presentment and nonpayment (*Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254); of a notarial seal (*The Gallego*, 30 Fed. Rep. 271); that a certificate, indorsed on the bond of a county treasurer by the deputy auditor-general of the State, was so indorsed by an officer of the State. *People v. Johr*, 22 Mich. 461.

Courts take judicial notice of the registers of counties (*Fancher v. DeMontegre*, 1 Head, 40); and this embraces sheriffs and marshals.

The court will take judicial notice of the office of treasurer of a school district (*State v. Dahl*, 65 Wis. 510); that a township trustee acts as trustee of a school township. *State v. McDonald*, 3 West. Rep. 753, 106 Ind. 233.

The circuit court will take cognizance of who are the justices of the peace for the county in which it is held (*Chambers v. People*, 5 Ill. 351; *Graham v. Anderson*, 42 Ill. 514); and that, by the Constitution and laws of the State, the terms of all justices of the peace terminate on a certain date. *Stubbs v. State*, 53 Miss. 437.

Courts do not take judicial notice of any person as an officer unless enumerated as such in the Code. *Alford v. State*, 8 Tex. App. 545.

The court does not judicially know that the prosecuting attorney and the presiding judge are the same persons. *Shropshire v. State*, 12 Ark. 190.

An appellate court cannot take judicial notice of the value of an attorney's services. *Pearson v. Darrington*, 32 Ala. 227.

## § 24. Circumstances in Their Relations to Judicial Notice.

**a. Civil Divisions of the State.**—Courts take judicial notice of the civil divisions of the States, such as counties, towns, cities and incorporated villages (*French v. Barre*, 2 New Eng. Rep. 809, 58 Vt. 567; *Hinckley v. Beckwith*, 23 Wis. 328; *Winnipiseogee Lake C. & W. Mfg. Co. v. Young*, 40 N. H. 420; *Goodwin v. Appleton*, 22 Me. 453; *Dickenson v. Breeden*, 30 Ill. 279; *State v. Powers*, 25 Conn. 48); that the United States is by law, for internal revenue purposes, divided into collection districts with defined geographical boundaries (*United States v. Jackson*, 104 U. S. 41, 26 L. ed. 651); that the State of Oregon is a congressional

and judicial district of the United States (*United States v. Johnson*, 2 Sawy. 482); that the State and the township are distinct organizations (*LaGrange v. Chapman*, 11 Mich. 499); of the names of the townships composing a county (*United States Exp. Co. v. Rush*, 24 Ind. 406); that there is but one township of a given description in the county (*Stoddard v. Sloan*, 65 Iowa, 680); that land in a certain township is in a certain county (*Fogg v. Holcomb*, 64 Iowa, 621); of the fact that a certain county constitutes a judicial district (*Com. v. Fitzpatrick*, 1 L. R. A. 451, 121 Pa. 109); that a certain judicial district is within and for a certain county, though it comprises only a portion of the territory of that county (*People v. Robinson*, 17 Cal. 363); that a road district in a certain county is within the State (*Humboldt Co. v. Dinsmore*, 75 Cal. 604); or that a road running from one terminus to the other is located wholly in such county. *Steinmetz v. Versailles, & O. Turnp. Co.* 57 Ind. 457.

**b. Subdivisions of the Fractional Townships.**—But courts will not take judicial notice of the subdivisions of a fractional township (*Stanberry v. Nelson*, Wright (Ohio) 766); nor that a county has adopted township organization. *State v. Cleveland*, 80 Mo. 108.

**c. Elections and Changes in Office.**—Courts take judicial notice of the day of holding the general state election within their respective States and of the officers to be then elected (*State v. Minnick*, 15 Iowa, 123); but not that an election has been held under a Local Option Law. *Grider v. Tully*, 77 Ala. 422.

Courts of the United States will take judicial notice of elections of state officers held at the same time as the election of the representatives in Congress and what ballots offered at such election should contain (*United States v. Morrissey*, 32 Fed. Rep. 147; *Re Coy*, 31 Fed. Rep. 794); of the accession of a new governor (*Hizer v. State*, 12 Ind. 330; *State v. Williams*, 5 Wis. 308), and of the changes made in the executive department of the government. *Linlsey v. Atty-Gen.* 33 Miss. 508.

Courts are presumed to know who the executive may be at any time when the fact may be called in question. *Deweese v. Colorado Co.* 32 Tex. 570.

**d. Matters of General Knowledge and Experience.**—Courts take judicial notice of the universal usage of merchants (*Williams v. Williams*, Carthew, 269), and ordinarily of a common-law cus-

tom (*Morning Star v. Cunningham*, 9 West. Rep. 59, 110 Ind. 328); for they will not pretend to be more ignorant than the rest of mankind. *Munn v. Burch*, 25 Ill. 38. See *Porter v. Hills*, 114 Mass. 106; *Ober v. Carson*, 62 Mo. 209; *Wilson v. Bauman*, 80 Ill. 493; *Ocean Beach Asso. v. Brinley*, 34 N. J. Eq. 438; *Townsend v. Whitby*, 5 Harr. (Del.) 55.

Judicial notice will be taken of whatever ought to be generally known within the limits of the court's jurisdiction (*Holmes v. Kring*, 12 West. Rep. 366, 93 Mo. 452); as, of the operations of commercial agencies (*Holmes v. Harrington*, 3 West. Rep. 296, 20 Mo. App. 661); or of the general certainty that matter carried through the mail will, in spite of imperfection in the address, reach its proper destination (*Gamble v. Central R. & Bkg. Co.* 80 Ga. 595); that generally trains running upon a railroad are run by the owners of the road (*South & North Ala. R. Co. v. Pilgreen*, 62 Ala. 305; *Evansville & C. R. Co. v. Smith*, 65 Ind. 92); of the fact that two railroads touching the same points are parallel and competing lines (*Gulf, C. & S. F. R. Co. v. State*, 1 L. R. A. 849, 72 Tex. 404); that a box freight car standing still at a highway crossing will not frighten horses of ordinary gentleness (*Gilbert v. Flint & P. M. R. Co.* 51 Mich. 488, 47 Am. Rep. 592); that alcohol is intoxicating (*Snider v. State*, 81 Ga. 753); that whiskey is an intoxicating liquor (*Eagan v. State*, 53 Ind. 162; *Schlicht v. State*, 56 Ind. 173); that distilled spirits are intoxicating (*Com. v. Peckham*, 2 Gray, 514; *Klare v. State*, 43 Ind. 483); that blackberry brandy is intoxicating (*Fenton v. State*, 100 Ind. 598); that lager beer is a malt liquor (*Adler v. State*, 55 Ala. 16; *Watson v. State*, 55 Ala. 158; *State v. Goyette*, 11 R. I. 592), and an intoxicating liquor. *Briffitt v. State*, 58 Wis. 39. *Contra, Shaw v. State*, 56 Ind. 188.

Where a stone wall is erected within 3 feet, 8 inches, of a window, judicial notice will be taken that it will diminish the passage of air and light. *Ware v. Chew*, 10 Cent. Rep. 675, 43 N. J. Eq. 493.

**e. Matters of History.**—Courts take judicial notice of transactions and objects which form a part of the history and geography of the country (*Hart v. Bodley*, Hardin (Ky.) 98; *Bell v. Burnet*, 2 J. J. Marsh. 516); of matters of public history affecting the whole people (*Payne v. Treadwell*, 16 Cal. 220), or the times (*Ashley v. Martin*, 50 Ala. 537), and such occurrences as consti-

tute a part of the history of the State. *Holmes v. Kring*, 12 West. Rep. 364, 93 Mo. 452.

Fremont's public career in California in 1846-47 is a matter of history. *DeCelis v. United States*, 13 Ct. Cl. 117. Courts will take judicial notice of the existence of the Civil War of 1861-65, and of the facts of public history connected with its origin and progress (*Cuyler v. Ferrill*, 1 Abb. U. S. 169); that the late Civil War or Rebellion was terminated prior to June first, 1865 (*Turner v. Patton*, 49 Ala. 406); of such a public event as Sherman's march to the sea and the time when it occurred. *Williams v. State*, 67 Ga. 260.

Judicial notice will be taken of all military orders issued by the commanding general or military governor while New Orleans was held by United States troops and which affected proceedings in the courts of the State (*Lanfear v. Mestier*, 18 La. Ann. 497; *Taylor v. Graham*, 18 La. Ann. 656; *New Orleans Canal & Bkg. Co. v. Templeton*, 20 La. Ann. 141); of General Ewing's Military Order No. 11, dated August 25, 1863, requiring removal from residences of persons in border counties. *Holmes v. Kring*, 12 West. Rep. 364, 93 Mo. 452.

But judicial notice will not be taken of the various orders issued by a military commander in the war (*Johnston v. Wilson*, 29 Gratt. 379; *Burke v. Miltenberger*, 86 U. S. 19 Wall. 519, 22 L. ed. 158); nor of the position of the lines in the field. *Kelley v. Story*, 6 Heisk. 202.

Courts judicially notice that certain localities or portions of a State in insurrection were in the possession and under the custody of the forces of the United States (*Rice v. Shook*, 27 Ark. 137); that Missouri was not one of the Confederate States (*Douthitt v. Stinson*, 63 Mo. 268); that when courts of a particular county were closed civil law was suspended, and military power prevailed (*Killebrew v. Murphy*, 3 Heisk. 546); but not that one belligerent or the other held the locality at a particular time. *McDonald v. Kirby*, 3 Heisk. 607. Compare *Bond v. Perkins*, 4 Heisk. 364.

Courts judicially notice whether a trustee acted with prudence in the management of assets during war times. *Foscue v. Lyon*, 55 Ala. 440.

Courts will not judicially notice the general organization of the Methodist Episcopal Church (*Sarahass v. Armstrong*, 16 Kan.

192), although a separation into two churches forms part of the history of the country. *Humphrey v. Burnside*, 4 Bush, 215.

**f. Geographical and Topographical Facts.**—The history of a country, its topography and general condition, being elements which enter into the construction of its laws, are matters within the judicial notice of courts (*Stout v. Grant County*, 5 West. Rep. 635, 107 Ind. 343; *Williams v. State*, 64 Ind. 553; *Mossman v. Forrest*, 27 Ind. 233; *Rice v. Montgomery*, 4 Biss. 75; *Hinckley v. Beckwith*, 23 Wis. 328); so of the boundaries of the States and the extent of their territorial jurisdiction (*Gilbert v. Moline W. P. & Mfg. Co.* 19 Iowa, 319; *Thomas v. Sigers*, 39 Pa. 486); of the navigability of large rivers (*Wood v. Fowler*, 26 Kan. 682); but not of the capacity of a creek for navigation. *Buffalo Pipe Line Co. v. New York, L. E. & W. R. Co.* 10 Abb. N. C. 107.

Courts take judicial notice of the area of an established county (*Jasper County Cours. v. Spitler*, 13 Ind. 235; *Buckinghouse v. Gregg*, 19 Ind. 401; *Wright v. Hawkins*, 28 Tex. 452); and of the geographical position of towns in the county. *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429. To nearly the same effect, see *State v. Tootle*, 2 Harr. (Del.) 541.

**g. Population.**—Courts take judicial notice of the result of taking the census (*People v. Williams*, 64 Cal. 87); of the population of the county according to the last census. *Worcester Nat. Bank v. Cheney*, 94 Ill. 430.

Under the Missouri Act of 1887, courts take judicial notice of the population of cities, as shown by the census. *State v. Dolan*, 12 West. Rep. 259, 93 Mo. 467.

**h. Facts in Relation to the Industrial Arts and Sciences.**—Courts will take judicial notice of what is commonly known in the various manufactures and industries (*Reed v. Lawrence*, 29 Fed. Rep. 915); of the character, construction, use, etc., of a manufactured article which has for many years been in common use throughout the country—such as the ice-cream freezer (*Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200); the peculiar nature of lotteries and the mode in which they are generally carried on (*Boullemer v. State*, 28 Ala. 83); of the business of mercantile agencies (*Holmes v. Harrington*, 3 West. Rep. 296, 20 Mo. App. 661); of the prices of ordinary labor (*Bell v. Barnett*, 2 J. J. Marsh. 516); or that carrying on the barber's business on Sunday is not a work of necessity. *State v. Frederick*, 45 Ark. 347.



i. **Matters of Science or Art.**—Courts will not take judicial notice that gin and turpentine are inflammable liquids, within the clause of a policy of insurance (*Mosley v. Vermont Mut. F. Ins. Co.* 55 Vt. 142); nor that kerosene oil is a refined oil (*Bennett v. North British & M. Ins. Co.* 8 Daly, 471); nor of the rule for measurement of corn in the shuck (*South & North Ala. R. Co. v. Wood*, 74 Ala. 449); nor of the capacity of a railroad car (*Ibid*); nor of the art of photography, the mechanical and chemical processes employed, the scientific principles on which they are based and their results (*Luke v. Calhoun County*, 52 Ala. 115); nor of a new process of practical utility in facilitating trade (*Wiggins Ferry Co. v. Chicago & A. R. Co.* 5 Mo. App. 347); nor, on a trial for arson, that coal oil is inflammable. *State v. Hayes*, 78 Mo. 307.

j. **Supreme Law of the Land.**—All courts take judicial notice of the Constitution of the United States and of the public laws of the State where they are exercising their functions (*Furman v. Nichol*, 75 U. S. 8 Wall. 44, 19 L. ed. 370; *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60); and of the Amendment to the United States Constitution abolishing slavery. *Graves v. Keaton*, 3 Coldw. (Tenn.) 8.

All courts, state and national, must take judicial notice of and be governed by a treaty of the United States, as a law of the land (*United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425; *United States v. The Peggy*, 5 U. S. 1 Cranch, 103, 2 L. ed. 49); of the public treaties between the United States and foreign countries (*La Croix v. Sarrazin*, 15 Fed. Rep. 489); of treaties, public acts and proclamations in carrying those treaties into effect (*United States v. Reynes*, 50 U. S. 9 How. 127, 13 L. ed. 74; *Baby v. Dubois*, 1 Blackf. 255); of the date of the ratification of a treaty (*Carson v. Smith*, 5 Minn. 78), and of the authority thereunder conferred upon the President. *Dole v. Wilson*, 16 Minn. 525.

Courts will take judicial notice of the laws of Mexico, upon which the title of lands in California depended prior to the cession of California to the United States (*Bouldin v. Phelps*, 30 Fed. Rep. 547); of how titles derived from the Spanish or Mexican government are to be perfected (*Semples v. Hagar*, 27 Cal. 163); that the laws of Maryland are in force in that part of the District of Columbia ceded by Maryland (*Bird v. Com.* 21 Gratt. 800); that the land in controversy was within an Indian reservation. *French v. Lancaster*, 2 Dak. 346.

**k. Congressional Acts.**—Courts take judicial notice of the laws of Congress (*Laidley v. Cummings*, 83 Ky. 607; *Wood v. Nortman*, 85 Mo. 298); of the Acts of Congress, as published in the pamphlet Acts of the Session (*White v. McGuirons*, Minor (Ala.) 331); of an Act affecting the rights of navigation and fishery, by allowing improvements to be made out into navigable waters (*Hammond v. Inloes*, 4 Md. 138; *Burnham v. Webster*, 5 Mass. 266); of the law applicable to the duties of the cashier of the assistant treasurer of the United States (*United States v. Bornemann*, 36 Fed. Rep. 257); of the Bankrupt Act of Congress and how it operates (*Mims v. Swartz*, 37 Tex. 13; *Morris v. Davidson*, 49 Ga. 361); of the Internal Revenue Laws of Congress (*Kessel v. Alletis*, 56 Barb. 362); of the form and substance of obligations of the United States authorized by Act of Congress (*United States v. Owens*, 37 Fed. Rep. 112); of the Acts of Congress relating exclusively to the District of Columbia (*Bayly v. Chubb*, 16 Gratt. 284); of the Acts of Congress granting swamp land to the States (*Nitche v. Earle*, 117 Ind. 270); of the Acts of Congress for the survey of land within the States, and the dedication of a portion for bounties to soldiers of the War of 1812 (*Dickinson v. Breeden*, 30 Ill. 279); of the government surveys and the legal subdivisions of the public lands (*Wright v. Phillips*, 2 G. Greene, 191; *Atwater v. Schenck*, 9 Wis. 160; *Hill v. Bacon*, 43 Ill. 477; *Mossman v. Forrest*, 27 Ind. 233; *Prieger v. Exchange Mut. Ins. Co.* 6 Wis. 89; *Gardner v. Eberhart*, 82 Ill. 316); of Acts of Congress confirming claims that lands in Missouri are public (*Papin v. Ryan*, 32 Mo. 21); of the Acts of Congress in regard to the disposal of the public lands (*Gooding v. Morgan*, 70 Ill. 275); of the intended area of a quarter-section of land (*Quinn v. Windmiller*, 67 Cal. 461); that the congressional survey of lands lying northwest of the Ohio River is public law (*Murphy v. Hendricks*, 57 Ind. 593); of a county in which a public highway is located, where the lands affected by it are described by sections, townships and ranges. *Adams v. Harrington*, 12 West. Rep. 303, 114 Ind. 66.

Courts take judicial notice that there may be found in many government surveys lands corresponding to a certain description (*Black v. Pratt Coal & C. Co.* 85 Ala. 504); of rules of navigation (*Sears v. The Scotia* ("The Scotia"), 81 U. S. 14 Wall. 170, 20 L. ed. 822); of statutes of a State which have been incorpor-

ated into Acts of Congress. *Flanigen v. Washington Ins. Co.* 7 Pa. 306.

l. **General Law.**—Courts take judicial notice of the law-merchant (*Jewell v. Center*, 25 Ala. 498; *Bradford v. Cooper*, 1 La. Ann. 325; *Reed v. Wilson*, 41 N. J. L. 29); of the custom of mutual credits in business houses (*Cameron v. Blackman*, 39 Mich. 108); of the commercial usage to observe Sundays and great festivals (*Sasscer v. Farmers Bank*, 4 Md. 409); that gold coin is no longer used in the business of the country, but has become an article of merchandise and traffic. *United States v. 4,000 American Gold Coins*, 1 Woolw. 217.

Of the rules and regulations as to the cutting of timber upon the public lands of the United States, prescribed by the Secretary of the Interior, courts will take judicial notice (*United States v. Williams*, 6 Mont. 379; *Pierce v. Kimball*, 9 Me. 54); and of the principles of common law as it prevails in other States. *Sandidge v. Hunt*, 40 La. Ann. 766.

m. **Usages and Customs.**—Courts will not take judicial notice of usages of business (*Goldsmith v. Sawyer*, 46 Cal. 209; *Johnson v. Robertson*, 31 Md. 476); or of local mining customs (*Lewis v. McClure*, 8 Or. 273; *Sullivan v. Hense*, 2 Colo. 424); or of the customs, laws or proceedings of inferior courts. *March v. Com.* 12 B. Mon. 25.

n. **Public Laws of the State.**—Courts take judicial notice of the existence and tenor of the public laws of the State (*Lane v. Harris*, 16 Ga. 217; *Bevens v. Baxter*, 23 Ark. 387; *Nitche v. Earle*, 117 Ind. 270); of the general law relative to highways (*Griswold v. Gallup*, 22 Conn. 208); of an Act prohibiting the sale of liquors (*Levy v. State*, 6 Ind. 281); of a supplement to such Act (*Hawthorne v. Hoboken*, 32 N. J. L. 172); of a public law, although local in its general provisions, if public in its character. *Bretz v. New York*, 6 Robt. (N. Y.) 325.

The Local Option Law, although local, is a public law, and courts are bound to notice it (*Higgins v. State*, 1 Cent. Rep. 704, 64 Md. 419); and such a statute, though local or private, as appears to have been relied on in the court below (*Hart v. Baltimore & O. R. Co.* 6 W. Va. 336), and a public Act expressly recognizing a private Act. *Lavalle v. People*, 6 Ill. App. 157.

Special laws enacted by a Territorial Legislature are public Acts. *Prell v. McDonald*, 7 Kan. 426.

Judicial notice will be taken that a statute has been properly enacted (*Madison County Comrs. v. Burford*, 93 Ind. 383); or of an unpublished statute (*People v. Hopt*, 3 Utah, 396); or of the time when a public statute takes effect. *State v. Bailey*, 16 Ind. 46; *Heaston v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275; *Pierson v. Baird*, 2 G. Greene, 235; *Berliner v. Waterloo*, 14 Wis. 378.

The public laws of a State are before its courts without being pleaded or inserted in the record (*Cincinnati, H. & I. R. Co. v. Clifford*, 13 West. Rep. 384, 113 Ind. 460), even though they contradict the allegations of the pleader. *State v. Jarrett*, 17 Md. 309.

Courts judicially notice statutes defining the boundaries of counties (*Ross v. Reddick*, 2 Ill. 73; *Lyell v. Lapeer County Suprs.* 6 McLean, 446); also public statutes of the State regulating the rate of speed. *Horn v. Chicago & N. W. R. Co.* 38 Wis. 463.

The courts take judicial notice of the proclamation of the governor as to the taking effect of the Acts. *State v. Bailey*, 16 Ind. 46.

Courts take judicial notice of the repealing statute, although it does not make a part of the case as reported. *Springfield v. Worcester*, 2 Cush. 52.

It is the duty of the court, *officio*, to notice the repeal of laws. *State v. O'Connor*, 13 La. Ann. 486.

The repeal of a section of an Act incorporating a town is a public Act. *Belmont v. Morrill*, 69 Me. 314.

They also take notice of a joint resolution which imposes a particular duty upon any officer of the State. *State v. Delesdenier*, 7 Tex. 76.

**o. Special Legislation.**—Courts cannot take judicial notice of a special Act. *Hailes v. State*, 9 Tex. App. 170; *Allegheny v. Nelson*, 25 Pa. 332.

A special Act for the survey of a particular tract of land is not, as a general rule, such a public statute as the courts are bound to take notice of and expound without requiring its production (*Allegheny v. Nelson*, 25 Pa. 332); and so of a private Act. *Timlow v. Philadelphia & R. R. Co.* 99 Pa. 284; *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477; *Workingmen's Bank v. Converse*, 33 La. Ann. 963.

As to how far private statutes may be noticed, see *Collier v. Baptist Education Soc.* 8 B. Mon. 68; *Somerville v. Wimbish*, 7

Gratt. 205; *Wisdom v. Wabash, St. L. & P. R. Co.* 1 West. Rep. 447, 19 Mo. App. 324.

Though private statutes of Virginia may be given in evidence without their being specially pleaded, the court will not judicially take notice of them, but they must be exhibited as other documents unless admitted by consent of parties. *Legrand v. Hampden Sidney College*, 5 Munf. (Va.) 324.

**p. Legislative Journals.**—Courts take judicial notice of legislative journals and of the modes by which domestic laws are authenticated (*State v. Smith*, 4 West. Rep. 103, 44 Ohio St. 349; *People v. Rice*, 7 West. Rep. 642, 64 Mich. 385); of the statute books and journals of the Houses of Legislature (*People v. Mahaney*, 13 Mich. 481); of the journal of each branch of the General Assembly (*Auditor v. Haycraft*, 14 Bush, 284; *Moody v. State*, 48 Ala. 115. *Contra*, *Grob v. Cushman*, 45 Ill. 119); of such contemporaneous history as led up to, and probably induced the passage of, the law. *Connecticut Mut. L. Ins. Co. v. Talbot*. 12 West. Rep. 296, 113 Ind. 373; *May v. Hoover*, 12 West. Rep. 171, 112 Ind. 455.

The judicial knowledge of courts is not presumed to extend to the history of every statute in its progress through the Legislature; and they will not take judicial notice of legislative journals (*Coleman v. Dobbins*, 8 Ind. 156), or whether or not there are proper and legitimate modes of expending money in procuring the passage of an Act of the Legislature. *Judah v. Vincennes University*, 16 Ind. 56.

The appellate court will inform itself, and take cognizance, of the true reading of a statute, by referring to the original Act on file in the office of the secretary of state. *Clare v. State*, 5 Iowa, 509.

It is not the duty of courts to take judicial notice of the execution of a public statute. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1.

**q. Municipal Ordinances.**—Municipal ordinances are not regarded in the light of law, of which the courts should take judicial notice. *Case v. Mobile*, 30 Ala. 538; *Garvin v. Wells*, 8 Iowa, 286; *New Orleans v. Labatt*, 33 La. Ann. 107; *State v. Jackson*, 6 La. Ann. 593; *Hassard v. Municipality No. Two*, 7 La. Ann. 495; *Winona v. Burke*, 23 Minn. 254; *Cox v. St. Louis*, 11 Mo. 431; *Mooney v. Kennett*, 19 Mo. 551; *Lucker v. Com.* 4

Bush, 440; *Wilson v. State*, 16 Tex. App. 497; *Chicago W. D. R. Co. v. Klauber*, 9 Ill. App. 613; *People v. Buchanan*, 1 Idaho, N. S. 681; *Austin v. Walton*, 68 Tex. 507.

Ordinances are not the subjects of judicial notice, but must be pleaded. *Keane v. Klausman*, 4 West. Rep. 276, 21 Mo. App. 485. But see *Downing v. Miltonvale*, 36 Kan. 740.

But on an appeal from a police judge the district court may take judicial notice of city ordinances. *Solomon v. Hughes*, 24 Kan. 211.

So a city court may take judicial notice of city ordinances without proof. *State v. Leiber*, 11 Iowa, 407.

So a mayor may take judicial notice of municipal ordinances. *La Porte City v. Goodfellow*, 47 Iowa, 572.

r. **Seal of the State.**—Courts take judicial notice of the seal of a State (*Robinson v. Gilman*, 20 Me. 299; *Lincoln v. Batelle*, 6 Wend. 475); but not of the private seal of the governor of a province. *Beach v. Workman*, 20 N. H. 379.

s. **Foreign Laws.**—Foreign laws must be proved; the court cannot be charged with knowledge of foreign laws. *Talbot v. Seeman*, 5 U. S. 1 Cranch, 1, 2 L. ed. 15; *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249; *Strother v. Lucas*, 31 U. S. 6 Pet. 763, 8 L. ed. 573; *Armstrong v. Lear*, 33 U. S. 8 Pet. 52, 8 L. ed. 863; *United States v. Wiggins*, 39 U. S. 14 Pet. 334, 10 L. ed. 481; *Ennis v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472; *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190; *Hinde v. Vattier*, 30 U. S. 5 Pet. 398, 8 L. ed. 168; *Priestman v. United States*, 4 U. S. 4 Dall. 28, 1 L. ed. 727; *Owings v. Hull*, 34 U. S. 9 Pet. 607, 9 L. ed. 246; *United States v. Turner*, 52 U. S. 11 How. 663, 13 L. ed. 857; *Pennington v. Gibson*, 57 U. S. 16 How. 65, 14 L. ed. 847; *Covington Draw Bridge Co. v. Shepherd*, 61 U. S. 20 How. 227, 15 L. ed. 896; *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Junction R. Co. v. Bank of Ashland*, 79 U. S. 12 Wall. 226, 20 L. ed. 385; *Elwood v. Flannigan*, 104 U. S. 562, 26 L. ed. 842; *Lamar v. Micou*, 114 U. S. 218, 29 L. ed. 94; *Chumasero v. Gilbert*, 24 Ill. 293; *Syme v. Stewart*, 17 La. Ann. 73; *Pecquet v. Pecquet*, 17 La. Ann. 204; *Frith v. Sprague*, 14 Mass. 455; *Palfrey v. Portland, S. & P. R. Co.* 4 Allen, 55; *Baptiste v. De Volunbrun*, 5 Har. & J. (Md.) 86; *Chouteau v. Pierre*, 9 Mo. 3; *Hooper v. Moore*, 5 Jones, L. 130; *Peck v. Hibbard*, 26 Vt. 698; *Woodrow v. O'Conner*, 28 Vt. 776; *Bean v. Briggs*, 4 Iowa, 464; *Eastman v. Crosby*, 8 Allen, 206.

The unwritten or common law of a foreign country or province must be proved as a fact. *Owen v. Boyle*, 15 Me. 147.

Courts will not officially recognize the Usury Laws of other countries (*Campion v. Kille*, 15 N. J. Eq. 476; *Cooke v. Crawford*, 1 Tex. 9), nor the Revenue Laws of a foreign country. *Ludlow v. Van Rensselaer*, 1 Johns. 94.

The statute law of Great Britain cannot be judicially noticed or established before our courts. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

The laws or usages of Turkey must be shown, to define the jurisdiction of consular courts there under treaty. *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190.

But in so far as the laws of a foreign country are properly operative as laws within the jurisdiction, the rule that a party claiming under a foreign law must prove it, as matter of fact, does not apply. *Doe v. Eslava*, 11 Ala. 1028.

Where countries have been acquired by the United States its courts take judicial notice of the laws which prevailed there up to the time of such acquisition (*United States v. Perot*, 98 U. S. 428, 25 L. ed. 251; *United States v. Turner*, 52 U. S. 11 How. 663, 13 L. ed. 857; *Fremont v. United States*, 58 U. S. 17 How. 542, 15 L. ed. 241); of the Spanish laws which prevailed in Louisiana before its cession to the United States (*United States v. Turner*, 52 U. S. 11 How. 663, 13 L. ed. 857. But see *United States v. Philadelphia & N. O.* 52 U. S. 11 How. 654, 13 L. ed. 852); of the laws of Spain which regulated the conveyance of real property in Mobile and the country adjacent. *Doe v. Eslava*, 11 Ala. 1028.

The public laws of a foreign country on a subject of common concern to all nations can be noticed as law by our courts of admiralty. *Talbot v. Seeman*, 5 U. S. 1 Cranch, 1, 2 L. ed. 15.

**t. Laws of a Sister State.**—State courts do not take judicial notice of the laws of other States, the several States being considered in this respect foreign to each other. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535; *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 431.

A party relying upon a law of another State must plead it and then allege such facts as bring the case within the law. In such case courts do not presume that the laws of another State are like their own (*Balfour v. Davis*, 14 Or. 47; *White v. Chaney*, 3 West. Rep. 276, 20 Mo. App. 389; *Silver v. Kansas City, St. L. & C.*

*R. Co.* 3 West. Rep. 284, 21 Mo. App. 5; *Leatherwood v. Sullivan*, 81 Ala. 458; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519; *Sells v. Haggard*, 21 Neb. 357; *Polk v. Butterfield*, 9 Colo. 325; *Camp v. Randle*, 81 Ala. 240; *Robards v. Marley*, 80 Ind. 185; *Neese v. Farmers Ins. Co.* 55 Iowa, 604; *Beauchamp v. Mudd*, Hardin (Ky.) 163; *Hosford v. Nichols*, 1 Paige, 220, 2 L. ed. 624; *Simms v. Southern Exp. Co.* 38 Ga. 129; *Whitesides v. Poole*, 9 Rich. L. 68; *Hilliard v. Outlaw*, 92 N. C. 286; so of a law of another State regulating the validity of contracts (*Jones v. Palmer*, 1 Dougl. (Mich.) 379; *Martin v. Martin*, 1 Smedes & M. 176); of the laws as to distribution to heirs (*McDaniel v. Wright*, 7 J. J. Marsh. 475); of the rate of interest allowed in another State (*Dorsey v. Dorsey*, 5 J. J. Marsh. 280; *Clarke v. Pratt*, 20 Ala. 470); so of the proposition that the common law prevails in the other States (*Bradshaw v. Mayfield*, 18 Tex. 21); so of a matter concerning the internal policy of another State. *Pichering v. Fisk*, 6 Vt. 102.

But Acts of a State Legislature, or of Congress, called for, recognized or adopted by public laws of any State, will be judicially noticed by the courts of such State. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. (Md.) 1.

Where the laws of one State recognize the official acts done in pursuance of the laws of another State, the courts of the State recognizing such acts will take judicial cognizance of the laws of such other State. *Carpenter v. Dexter*, 75 U. S. 8 Wall. 513, 19 L. ed. 426.

When a statute of another State has once been recognized as law, courts of the latter State will thereafter take judicial cognizance of the statute. *Graham v. Williams*, 21 La. Ann. 594.

That the law of another State differs from the law of New York will be judicially noticed. *Phenix Ins. Co. v. Church*, 59 How. Pr. 293.

u. **Records of a Sister State.**—As to credit to be given to judicial proceedings in other States, courts take notice *ex officio* of the local laws of the State from which the record comes. *Ohio v. Hinchman*, 27 Pa. 479.

When the judgment of a court of a sister State is impleaded, cognizance of the laws of such State is taken. *Paine v. Schenectady Ins. Co.* 11 R. I. 411; *Ohio v. Hinchman*, 27 Pa. 479. Compare *Hobbs v. Memphis & C. R. Co.* 9 Heisk. 873; *Anderson v. May*, 10 Heisk. 84.



**v. Facts in Relation to the Circulating Medium.**—Courts take judicial notice of the character of the circulating medium, and popular language in reference to it (*Lampton v. Haggard*, 3 T. B. Mon. 150; *Jones v. Overstreet*, 4 T. B. Mon. 547); that under the statutes of the United States, a dollar is the unit of value, and that a package containing \$800 is an article of value (*United States v. Fuller*, 4 N. M. 358); that bills averred to be “currency of the United States of America” are prima facie of a commercial value equal to that imported by their face (*Gady v. State*, 83 Ala. 51); that bank notes constitute a circulating medium and are of value (*Shaw v. State*, 3 Sneed, 86); of general facts connected with the issuing, use and depreciation of the Confederate currency (*Simmons v. Trumbo*, 9 W. Va. 358); but not of the extent of depreciation of the currency during the Rebellion. *Modawell v. Holmes*, 40 Ala. 391.

Judicial notice will be taken of the fact that the dollars in Confederate currency were different in value from lawful money of the United States (*Keppel v. Petersburg R. Co.* Chase, Dec. 167); of the different classes of notes and bills in circulation as money at a particular time. *Hart v. State*, 55 Ind. 599; *Lumpkin v. Murrell*, 46 Tex. 51.

The value of the notes of the Bank of the Commonwealth at any particular time is not judicially noticed. *Feemester v. Ringo*, 5 T. B. Mon. 336.

The value of Canada currency, and the rate of Canadian interest, are not judicially known by courts within the United States (*Kermott v. Ayer*, 11 Mich. 181); nor that a note expressed to be payable in New Orleans, La., is meant to be payable in the State of Louisiana (*Russell v. Martin*, 15 Tex. 238); nor of what are the fair and usual commissions on acceptances paid without funds. *Seymour v. Marvin*, 11 Barb. 80.

**w. Meaning of Words and Phrases.**—Courts take judicial notice of the meaning of words and phrases in the English language (*Grennan v. McGregor*, 78 Cal. 258); and of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence (*Eureka Vinegar Co. v. Gazette Printing Co.* 35 Fed. Rep. 570); of the meaning of current phrases which everybody else understands (*Bailey v. Kalamazoo Pub. Co.* 40 Mich. 251); of what is meant by a “gift enterprise,” upon the trial of one indicted for advertising such (*Lohman v. State*, 81 Ind. 15); of the meaning of initials appended

to the clerk's signature (*Buell v. State*, 72 Ind. 523); of the meaning of initials used in the description of land (*Kile v. Yellowhead*, 80 Ill. 208); of the meaning of "C. O. D." when affixed to packages sent by common carriers (*State v. Intoxicating Liquors*, 73 Me. 278. *Contra*, *McNichol v. Pacific Exp. Co.* 12 Mo. App. 401); but not that "D. C." in a bail bond means Dermmett County (*Vivian v. State*, 16 Tex. App. 262); nor that "St. Louis, Mo.," in the date of a contract, means St. Louis in the State of Missouri. *Ellis v. Park*, 8 Tex. 205.

Judicial notice will, however, be taken of the customary abbreviations of Christian names (*Stephen v. State*, 11 Ga. 225; *Weaver v. McElhenon*, 13 Mo. 89); or ordinary abbreviations, such as "admr." for administrator. *Moseley v. Mastin*, 37 Ala. 216.

But judicial notice will not be taken of matters contained in dictionaries, encyclopedias or other publications, unless such matters are of universal notoriety and may be regarded as forming part of the common knowledge of every person (*Kaolatype Engraving Co. v. Hoke*, 30 Fed. Rep. 444); nor that playing "policy" is playing a game of chance (*State v. Russell*, 17 Mo. App. 16; *State v. Sellner*, 17 Mo. App. 39); nor that the words "drawing" and "Kentucky Drawing" designate a game of chance (*State v. Bruner*, 17 Mo. App. 274); nor of the proper orthography or orthoepey of Polish names. *State v. Johnson*, 26 Minn. 316.

## § 25. Rules Applicable in Particular States.

a. **Alabama.**—Courts take judicial notice of the fact that the federal government has taken no action declaring a forfeiture of certain state lands (*Mathis v. Tennessee & C. R. R. Co.* 83 Ala. 411); that there are no tidal streams in Jackson County (*Walker v. Allen*, 72 Ala. 456); that all the lands in Franklin County are held under the government of the United States (*Lewis v. Harris*, 31 Ala. 689); that lands within the district of lands for sale at Cahaba are within the State. *King v. Kent*, 29 Ala. 542.

Courts will take judicial notice of the constitutional provision, to prevent the executive power from controlling the public moneys, and not to restrict the legislative power (*Smith v. Speed*, 50 Ala. 276); that the assets of the state bank and branches are placed in the hands of commissioners (*Douglass v. Branch Bank at Mobile*, 19 Ala. 659); that contracts made in January, 1865, were made with reference to Confederate currency (*Buford v. Tucker*, 44 Ala. 89); that no part of the Tallapoosa River lies

within the corporate limits of the City of Montgomery (*Montgomery City Council v. Montgomery & W. Pl. Road Co.* 31 Ala. 76); to what chancery district Mobile belonged (*Alabama G. L. Ins. Co. v. Cobb*, 57 Ala. 547); of the existence and contents of the American Table of Mortality in estimating dower right. *Gordon v. Tweedy*, 74 Ala. 232; *McDonnell v. Alabama G. L. Ins. Co.* 85 Ala. 401.

The probate court may take judicial notice of the fact that Eufaula is an incorporated city in said county (*Smitha v. Flournoy*, 47 Ala. 345); that slavery was destroyed in Alabama by the act of war (*Ferdinand v. State*, 39 Ala. 706); of the term of office of a notary. *Cary v. State*, 76 Ala. 78.

But courts will not take judicial notice of the laws of Louisiana in reference to estates of insolvents. *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468.

**b. Arkansas.**—The court will take judicial notice that the Ordinance of Secession in that State, which interrupted official business in the United States Land Office, was passed in May, 1861 (*Chowning v. Stanfield*, 49 Ark. 87); that the common law is the basis of the jurisprudence of another State. *Thorn v. Weatherly*, 50 Ark. 237.

**c. California.**—Courts will take notice that coins are always treated as a standard of value in that State (*Re Sanderson*, 74 Cal. 199); of the relation of the streets of San Francisco to one another, and of the directions in which they run. *Brady v. Page*, 59 Cal. 52.

But the courts of California are not bound to notice rules of the departments of the federal government, or the board of land commissioners or surveyor-general, as, that original papers are not to be taken from their files; but the fact must appear by affidavit or otherwise. *Hensley v. Tarpey*, 7 Cal. 288.

**d. District of Columbia.**—Courts will take notice of the authority of a notary public in the State of Maryland. *Denmead v. Maack*, 2 McArth. 475.

**e. Illinois.**—Courts will take notice that the City of Monmouth is in Warren County in Illinois, and presume a lot described as "lot five in block one, in Haley's addition to the City of Monmouth," without stating in what State or county, to be in that City of Monmouth in this State (*Harding v. Strong*, 42 Ill. 148); that the

United States was the proprietor of land granted by it to the State of Illinois. *Smith v. Stevens*, 82 Ill. 554.

The appellate court will not judicially notice who are judges of the circuit court. *Russell v. Sargent*, 7 Ill. App. 98.

f. **Indiana.**—The court will take judicial notice of all its laws. *Junction R. Co. v. Bank of Ashland*, 79 U. S. 12 Wall. 226, 20 L. ed. 385.

Claims of Virginia, to the Illinois grant, constitute a part of the history and laws of Indiana. *Henthorn v. Doe*, 1 Blackf. 159.

The courts will take judicial notice that the lands in Ripley County were surveyed and laid out by Acts of Congress, and that their sides are east, west, north and south (*Buchanan v. Whitham*, 36 Ind. 257); of the geographical position of the falls of the Ohio River and that there are no pilots appointed for other falls in the State (*Cash v. Clark County Auditor*, 7 Ind. 227); that during and since the Civil War the adjutant-general has made records of the muster rolls of the regiments furnished the United States (*Monroe County Comrs. v. May*, 67 Ind. 562); that funds raised for or appropriated to the support of common schools pertain to the school corporation of a township (*Skinner v. Harrison Twp.* 2 L. R. A. 137, 116 Ind. 139); that New Albany is in Floyd County (*Luck v. State*, 96 Ind. 16); that the neighborhood three miles south of Westville is in La Porte County. *Louisville, N. A. & C. R. Co. v. Hixon*, 101 Ind. 337.

Courts of Indiana will not, however, judicially notice the names of cities or towns adopting the General Incorporation Act. *Johnson v. Indianapolis*, 16 Ind. 227.

g. **Iowa.**—The supreme and district courts will take judicial notice of who are the judges of the various courts of the State and of their terms of office. *Upton v. Paxton*, 72 Iowa, 295.

h. **Kansas.**—Courts will take notice of all the laws of the State (*Re Division of Howard County*, 15 Kan. 194); of the Constitution of a sister State, so far as the jurisdiction of its court is shown (*Dodge v. Coffin*, 15 Kan. 277. See *Shed v. Augustine*, 14 Kan. 282); and that, by the Constitution, the court is a common-law court. *Butcher v. Bank of Brownsville*, 2 Kan. 70.

i. **Kentucky.**—The court will take judicial notice of what were the laws of Virginia before the separation. *Delano v. Jopling*, 1 Litt. 119, 417.

j. **Louisiana.**—The court will judicially notice that the common

law is the basis of the jurisprudence of a particular State (*Copley v. Sanford*, 2 La. Ann. 335; *Kling v. Sejour*, 4 La. Ann. 129); also the fact that the vendor's privilege upon movables is not recognized by the other States of the Union. *McIlvaine v. Legare*, 34 La. Ann. 923.

k. **Mississippi.**—Courts cannot judicially know that a sale of land has been made because they are bound to know that there is a law providing for such sale. *Bledsoe v. Doe*, 4 How. (Miss.) 13.

l. **Missouri.**—The Missouri Act incorporating the City of Kansas is a public Act. *Bowie v. Kansas City*, 51 Mo. 454.

The courts take judicial notice of the Spanish laws formerly in force (*Chouteau v. Pierre*, 9 Mo. 3; *Ott v. Soulard*, 9 Mo. 581); that the State of Missouri is east of the Rocky Mountains. *Price v. Page*, 24 Mo. 65.

m. **North Carolina.**—Courts will take notice of a statute in respect to local option, and also of a public local statute which changes the name of a township. *State v. Cooper*, 101 N. C. 684.

n. **Tennessee.**—Courts will take notice of the suspension of the Statute of Limitations from May 6, 1861, to January 1, 1867. *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea, 742.

o. **Texas.**—Courts will take notice that in 1869 the government of Texas was administered by military authority under the Reconstruction Acts of Congress (*Gates v. Johnson County*, 36 Tex. 144); of the principles of the common law, including equity, which apply to the case (*Nimmo v. Davis*, 7 Tex. 26); of the Act creating the Mississippi and Pacific Railroad reservation, and that the whole of Ellis County fell therein (*Wright v. Hawkins*, 28 Tex. 452); that the City of Galveston is in the county of the same name. *Solyer v. Romanet*, 52 Tex. 562.

p. **Wisconsin.**—Courts will not take judicial notice that there are county judges in New York, or that they are authorized to administer oaths. *Fellows v. Menasha*, 11 Wis. 558.

§ 26. **Recent Utterances of State and Federal Courts on the Subject.**—Courts will take judicial notice of the contents of the Bible and that the religious world is divided into sects, and of the general doctrines maintained by each sect. *State v. Edgerton School Dist. No. 8*, 7 L. R. A. 330, 76 Wis. 177.

The law of a sister State of the American Union is a foreign law in the sense that it is not judicially noticed, but must, in order

to have effect, be proved as a fact. *Conrad v. Fisher*, 8 L. R. A. 147, 37 Mo. App. 352.

It is within common knowledge that perishable freight ought ordinarily to be transported by a railroad a distance of 64 miles in less than 4 days so as to justify a finding of negligence on the part of the company, where there is no evidence showing how many transfers of the cars were necessarily made. *St. Clair v. Chicago, B. & Q. R. Co.* 80 Iowa, 304.

A court in Connecticut has judicial knowledge that Ansonia is easily accessible from New York City by railway, that there is frequent communication by mail, and that the telegraph may be used and a reply obtained in half an hour and at a trifling expense. *Morgan v. Farrel*, 58 Conn. 413.

A court has judicial knowledge of the filing of an answer in a suit. *Security Co. v. Arbuckle*, 123 Ind. 518.

Courts take judicial notice of the days on which Sunday falls, and it is proper, if the fact is material, to charge the jury that certain dates fall on Sunday. *Swales v. Grubbs*, 126 Ind. 106.

It may be assumed that it is a part of the common knowledge that axle skeins for wagons have for many years been made of cast metal of such shape as has been deemed desirable for their use, and that there was no difficulty in casting skeins which reach onto or cover the shoulder of the axle, or extend along the under side of the axle, back of the collar. *Studebaker Bros. Mfg Co. v. Illinois Iron & B. Co.* 42 Fed. Rep. 52.

Judicial notice cannot be taken of the fact that there is or is not a railroad company of a certain name. *Western R. Co. of Alabama v. McCall*, 89 Ala. 375.

The Supreme Court of the State cannot judicially know the ordinances of a city. *Central Sav. Bank v. Baltimore*, 71 Md. 515.

Judicial notice may be taken of the fact that at a certain date a section of country was, for the greater portion of it, unsettled and much of it occupied by or within the range of wild Indians. *United States v. Wallamet, V. & C. M. Wagon Road Co.* 42 Fed. Rep. 351.

In the ascertainment of any facts of which judges are bound to take judicial notice, they may refresh their memory and inform their conscience from such sources as they deem most trustworthy. *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691.

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public Acts of the Legislature and executive, although those Acts are not formally put in evidence, nor in accord with the pleadings. *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691.

Courts will take judicial notice of the days of the week and month, and hence of the fact that an installment of interest on a note fell due on Saturday. *Campbell v. West*, 86 Cal. 197.

Judicial notice may be taken of the height of the human body and the measurement of its several parts, for the purpose of reversing a judgment on a verdict which necessarily involves a finding, without any evidence as to plaintiff's height, that while sitting on a car he was struck on the head by an arch 4 feet 7 inches above the top of the car. *Hunter v. New York, O. & W. R. Co.* 6 L. R. A. 246, 116 N. Y. 615.

Courts must take judicial notice of a charter when declared by the Legislature to be a public Act. *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513.

The United States Supreme Court takes judicial notice of the fact that at the date of his certificate a deputy comptroller of the currency was such officer. *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531.

All courts, both state and federal, will take judicial notice of public Acts, and they are also bound to give effect and recognition to the same. *Armstrong v. United States*, 80 U. S. 13 Wall. 154, 20 L. ed. 614.

The courts will not take judicial notice that electricity as used by a street-railway company for the propulsion of its cars is dangerous. *Taggart v. Newport St. R. Co.* 7 L. R. A. 205, 16 R. I. 668.

The court will take judicial notice of the American Table of Mortality. *Gordon v. Tweedy*, 74 Ala. 232.

Presumedly, by force of similar reasoning, the Carlisle and Northampton Tables are entitled to the same distinction, as is inferable from the following well-considered opinion by the New York Court of Appeals: "An exception was taken by the counsel to the reception of the Northampton Tables as evidence tending to show the probable duration of the life of the plaintiff, it may be remarked that the objection thereto was general and not based upon the want of preliminary proof showing their genuineness

or want of identity with those long in use by insurance companies and courts for this purpose. These Tables were used by the supreme court in *Wager v. Schuyler*, 1 Wend. 553, for this purpose, in an action of covenant, where the probable duration was determined by the court in this was, upon a verdict, subject to the opinion of the court. That they have been long so used by the court of chancery in this State and courts of equity in England is too well known to require any citation of cases. They have been adopted by a rule of the supreme court for this purpose. Rule 85. It would be singular indeed, if, under these facts, they were to be held inadmissible, when the same fact was to be determined by jury. They were competent in connection with the proof given as to the health, constitution and habits of the plaintiff." *Schell v. Plumb*, 55 N. Y. 592.

The Northampton Tables are competent evidence upon the question as to the probable duration of a life. *Ibid.* See also *Greer v. New York*, 1 Abb. Pr. N. S. 206.

Where, in an action for personal injuries, there is some evidence tending to show that the injuries are of a permanent character, it is proper to admit mortuary tables to show the expectancy of life. *Northeastern R. Co. v. Chandler*, 84 Ga. 37.

The Carlisle Life Tables are admissible in evidence in an action for personal injuries, where the evidence as to the permanency of the injuries is conflicting. *Blair v. Madison County* (Iowa) 46 N. W. Rep. 1093.

The most extreme position of which we have any recent knowledge, and which has been assumed with regard to judicial notice, is that exhibited by the following extract from a recent opinion from the Supreme Court of the United States, *Mr. Justice Field* writing for reversal: "In the present case, the court below was required to take notice of the extent of its jurisdiction, not only of the subjects placed by law under its cognizance, but of its extent territorially. It should have known judicially whether the laws of the Territory, which it was appointed to expound, were in operation with reference to a subject brought before it in the regular course of procedure. It was bound to know whether they were in force in the township designated in the County of Lewis and Clarke on the 13th day of May, 1873, and that necessarily involved a knowledge of its distance from the capital of the Territory. It may be that the judge's information on the subject was at fault, and calculations and inquiries on the subject may



have been necessary. Such is the case with reference to a great variety of subjects of general concern, of which courts are required to take judicial notice. Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper source. In this case, it appears by the government maps of the Territory, upon which the public surveys are marked, that the distance from the seat of government to the nearest point of the township in which the mining ground in controversy is situated exceeds seventy-five miles." *Hoyt v. Russell*, 117 U. S. 401, 29 L. ed. 914 (1885).

§ 27. **Manifest Defects of Any Tabulation of the Topics Embraced within This Subject.**—Summarizing this somewhat extended view of the topic it may be affirmed that facts of universal notoriety need not be proved. As aptly expressed by an early text-writer, "To require proof of every fact, as that Shang-Hai is beyond the jurisdiction of the court, would be utterly and absolutely absurd." *Gres. Eq. Ev.* 294. This last proposition is reasonably apparent, but some obscurity invests the case of *Hoare v. Silverlock*, 12 Q. B. 624, which was a libel suit which charged that the friends of the plaintiff had "realized the fable of the frozen snake," and in which the court took judicial notice that the knowledge of that fable existed generally in society.

We venture to doubt that the most unremitting industry will fail to disclose a more questionable application of the doctrine of judicial notice; and *Mr. Justice* Swaine, in a comparatively recent case, with this identical decision well in mind, and with an attitude of protest at its enormity, significantly says: "This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative." *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200.

The list of matters judicially noticed is not intended to be complete in this review and it is a matter of grave doubt if any absolutely complete list could be collated; as it is practically impossible to enumerate everything which is so notorious in itself or so distinctly recorded by public authority that it would be superfluous to prove it. In some States of the Union all Acts of incorporation are deemed public laws. *Mass. Pub. Stat. chap. 169, sec. 68.* *State v. McAllister*, 24 Me. 139, is an instructive case in point, although perhaps it does not absolutely affirm the proposition.

## CHAPTER III.

### PRESUMPTIONS.

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§ 28. **Blackstone's Definition.**—Next to positive is circumstantial evidence, or the doctrine of presumptions. When a fact cannot itself be demonstrated, that which comes nearest to proof of it is proof of the circumstances necessarily or usually attending it; this proof creates a presumption, which is relied upon till the contrary is proved. 3 Bl. Com. 371.

Presumptive evidence proceeds upon the theory that the jury can infer the existence of a fact from another fact that is proved, and which most usually accompanies it. *Home Ins. Co. v. Weide*, 78 U. S. 11 Wall. 440, 20 L. ed. 198 (1870), Davis, J. See also *Stanley v. State*, 26 Ala. 30; *Binns v. State*, 66 Ind. 432; *Chesley v. Brown*, 11 Me. 146; *Bow v. Allentown*, 34 N. H. 365; *Snediker v. Everingham*, 27 N. J. L. 150, 153; *Betts v. Jackson*, 6 Wend. 181; *Jackson v. Warford*, 7 Wend. 66; *McConnell's App.* 97 Pa. 34; *Oaks v. Weller*, 16 Vt. 71; *Welch v. Sackett*, 12 Wis. 257.

§ 29. **Presumption of Law.**—A rule which, in certain cases, either forbids or dispenses with any ulterior inquiry. *Schuylkill & D. Imp. & R. Co. v. Munson*, 81 U. S. 14 Wall. 449, 20 L. ed. 872 (1871).

Such presumptions arise in respect to the intermediate proceedings in cases where lands are sold under licenses granted by courts to executors, administrators, guardians and other officers, where they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings. Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise, great uncertainty of titles and other public mischief would ensue, but the rule as to lapse of time accompanied by the acquiescence of parties

adversely interested does not in general extend to records and public documents, which are supposed always to remain in the custody of officers charged with their preservation, and which, therefore, must be proved or their loss accounted for by secondary evidence. *Hathaway v. Clark*, 5 Pick. 490; *Brunswick First Parish v. McKean*, 4 Me. 508.

§ 30. **Presumption of Fact.**—A presumption of a fact is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known. The principle is recognized in jurisprudence that proof of certain facts may lead irresistibly to the presumption that another act, of which there is no direct proof, was committed or done. Men are presumed to act according to their own interests. It is presumed that regular and ordinary means are adopted for a given end. So where the means calculated to attain a certain end appear to have been adopted, and the end itself appears to have been attained, a particular completion will be presumed. 1 Phil. Ev. 599–610; *Roberts v. People*, 9 Colo. 458. In support of the proposition above enunciated, I cite art. 87 of Stephen's Digest: "When any document purporting to be and stamped as a deed appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon."

It should be borne in mind that the inferences indulged by this presumption are by no means uniform. "Where the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority, and the seal itself is prima facie evidence that it was affixed by proper authority." *Angell & A. Corp.* § 224; *Osborne v. Tunis*, 25 N. J. L. 633; *Lovett v. Steam Saw-Mill Asso.* 6 Paige, 54, 3 L. ed. 896; *Flint v. Clinton County*, 12 N. H. 430; *Chouquette v. Barada*, 28 Mo. 491; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 70, 6 L. ed. 554. "The certificate of the acknowledgment of a deed is received without proof of the official character of the officer granting it." *Thurman v. Cameron*, 24 Wend. 91, 92.

§ 31. **Presumptions as to Documents Thirty Years Old.**—The presumption is that where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that

the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court. Steph. Dig. Ev. art. 88.

§ 32. **Proper Custody of Such Documents.**—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. *Ibid.*

§ 33. **Character of Evidence Offered in Support of Presumptions.**—If the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. *Home Ins. Co. v. Weide*, 78 U. S. 11 Wall. 440, 20 L. ed. 198 (1871).

§ 34. **Inferences from Inferences not Permitted.**—Inferences from inferences are not permitted,—only immediate inferences from facts proved. If the presumed fact has no immediate connection with or relation to the established fact from which it is inferred, it is regarded as too remote. Thus, the presumption that a public officer has done his duty does not supply proof of independent and substantial facts. *United States v. Ross*, 92 U. S. 283, 284, 23 L. ed. 708 (1875), Strong, *J.*; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 470, 23 L. ed. 362 (1875).

A judge, in deciding that evidence of a particular circumstance is not receivable, impliedly decides that no presumption can be drawn from it which ought to have effect with the jury. A presumption which the jury is to draw is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no "open and visible connection" between the facts out of which the two presumptions arise. *Douglass v. Mitchell*, 35 Pa. 446, 447 (1860), Strong, *J.*; *McAleer v. McMurray*, 58 Pa. 126 (1868). An inference from an inference, if allowed at all, has little probative force. *Ayer v. Steamer Glaucois*, 4 Cliff. 171 (1870).

§ 35. **Wharton's Definition.**—Dr. Wharton has been peculiarly felicitous in his definition of this term. At sec. 1237 we find the

following language: "Presumptions of law are uniform and constant rules, applicable only generically. Presumptions of fact, on the other hand, are conclusions drawn by free logic, applicable only specifically." See *Hamilton v. People*, 29 Mich. 193.

A presumption of law derives its force from jurisprudence as distinguished from logic. A statute, for instance, may say that a person not heard of for ten years is to be counted as dead. This is a presumption of law, and is arbitrarily to be applied to all cases where parties have been absent for such period without being heard from. If there be no such statute, then logic, acting inductively, will have to establish a rule to be drawn from all the circumstances of a particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. It is not necessary to a presumption of law, that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes juridical maxims established by the Legislature. To make, however, a maxim established by the courts in this sense a statute, it must be not only definitely promulgated by judicial authority, but finally accepted; such maxims being, to adopt Blackstone's metaphor, statutes worn out by time, the maxim remaining, though the formal part of the statute has disappeared.

To a presumption of law probability is not necessary, but probability is necessary to a presumption of fact. Presumptions of law relieve, either provisionally or absolutely, the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. Evidence, therefore, which is the necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Until the evidence is adduced there can be no presumption of fact; there is no presumption of law that is not applicable before the evidence is adduced. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconsistent and fluctuating.

A critical scrutiny of judicial interpretation impels the conclusion that the legislative definition embodied in section 1959 of the California Code is the most concise and logical yet attempted: "A presumption is a deduction which the law expressly directs to be made from particular facts." Mr. Wharton says that a presumption of law is a juridical postulate; that a particular predicate is



universally assignable to a particular subject; and he defines a presumption of fact as "A logical argument from a fact to a fact, or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful from a fact which is proved," hence, a presumption of fact, to be valid, must rest on a fact in proof. Whart. Ev. § 1226.

§ 36. **Inferences and Presumptions.**—Indirect evidence is of two kinds, (1) inferences, and (2) presumptions. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect. Inferences fall within the exclusive province of the jury. It is erroneous for the court to charge the jury that the existence of a fact proved raises a reasonable presumption of the existence of another fact. *People v. Walden*, 51 Cal. 588.

§ 37. **Statutory Law of California on This Subject.**—Three sections of the California Code embody the most exhaustive résumé of authority, and reflect so faithfully the present attitude of the law regarding this somewhat extended topic, that a failure to reproduce the salient features they embody would argue gross neglect of the subject. As a monumental exhibit of condensation they will attract attention, and as an epigrammatic statement of statutory law they are of ideal excellence, and singularly pertinent in their relations to the law of evidence.

The following extract is from part 4, California Code of Civil Procedure, title *Evidence, Inferences and Presumptions*, chap. 5:

a. **When Presumptions may be Controverted.**—§ 1961. "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumptions."

b. **What Presumptions are Conclusive.**—Sec. 1962. "The following presumptions and no others are deemed conclusive:

"1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;

"2. The truth of the facts recited, from a recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;

"3. Whenever a party has, by his own declaration, act or omis-

sion, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it;

"4. A tenant is not permitted to deny the title of his landlord, at the time of the commencement of the relation;

"5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;

"6. The judgment or order of a court, when declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

"7. Any other presumption which by statute is expressly made conclusive."

**c. What Presumptions may be Controverted; Extended Tabulation of These Instances.**—Sec. 1963. "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

"1. That a person is innocent of crime or wrong;

"2. That an unlawful act was done with an unlawful intent;

"3. That a person intends the ordinary consequences of his voluntary act;

"4. That a person takes ordinary care of his own concern;

"5. That evidence willfully suppressed would be adverse if produced;

"6. That higher evidence would be adverse from inferior, being produced;

"7. That money paid by one to another was due the latter;

"8. That a thing delivered by one to another was due the latter;

"9. That an obligation delivered up to the debtor has been paid;

"10. That former rent or installments have been paid when a receipt for the later is produced;

"11. That things which a person possesses are owned by him;

"12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;

"13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly;

"14. That a person acting in a public office was regularly appointed to it;

"15. That official duty has been regularly performed;

"16. That a court or judge, acting as such, whether in this State or any other State or country, was acting in the lawful exercise of his lawful jurisdiction;

"17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;

"18. That all matters within an issue were laid before the jury and passed upon by them; and, in like manner, that all matters within a submission to arbitration were laid before the arbitrator and passed upon by him;

"19. That private transactions have been fair and regular;

"20. That the ordinary course of business has been followed;

"21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration;

"22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

"23. That a writing is truly dated;

"24. That a letter duly directed and mailed was received in the regular course of the mail;

"25. Identity of person from identity of name;

"26. That a person not heard from in seven years is dead;

"27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

"28. That things have happened according to the ordinary course of nature and the ordinary habits of life;

"29. That persons acting as copartners have entered into a contract of copartnership;

"30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

"31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

"32. That a thing once proved to exist continues as long as is usual with things of that nature;

"33. That the law has been obeyed;

"34. That a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained;

"35. That a printed and published book purporting to be printed or published by public authority was so printed or published;

"36. That a printed and published book purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published, contains correct reports of such cases;

"37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

"38. The uninterrupted use by the public of land for a burial ground for five years, with the consent of the owner, and without a reservation of his right, is presumptive evidence of his intention to dedicate it to the public for that purpose;

"39. That there was a good and sufficient consideration for a written contract;

"40. When two persons perish in the same calamity, such as a wreck, a battle or conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, sex, according to the following rules:

"41. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;

"42. If both were above the age of sixty, the younger is presumed to have survived;

"43. If one be under fifteen, and the other above sixty, the former is presumed to have survived;

"44. If both be over fifteen and under sixty, and sexes be different, the male is presumed to have survived; if the sexes be the same, then the older;

"45. If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived."

§ 38. **Presumptions Affecting Judicial Acts.**—The best exemplification of the rules regulating the familiar principles that characterize judicial acts, is in the maxim, "Judicial action is presumed regular." It is a politic intendment inspired by necessity, and is approvingly noticed in every jurisdiction of this country. *Wallace v. Cox*, 71 Ill. 548; *Hahn v. Kelly*, 34 Cal. 400; *Markel v. Evans*, 47 Ind. 326; *Butcher v. Bank of Brownsville*, 2 Kan. 80; *Bumpus v. Fisher*, 21 Tex. 561; *Pittsburgh, C. & St.*

*L. R. Co. v. Ramsey*, 89 U. S. 22 Wall. 322, 22 L. ed. 823; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *State v. Lewis*, 22 N. J. L. 564; *Horner v. Doe*, 1 Ind. 130, 48 Am. Dec. 355; *Mechanics & T. Bank v. Union Bank*, 89 U. S. 22 Wall. 276, 22 L. ed. 871; *Davis v. Hudson*, 29 Minn. 28; *Reed v. Vaughan*, 15 Mo. 141; *Hays v. Ford*, 55 Ind. 52; *Callison v. Autry*, 4 Tex. 371; *Frosh v. Holmes*, 8 Tex. 29; *Sumner v. Cook*, 12 Kan. 162; *Dodge v. Coffin*, 15 Kan. 277; *Reynolds v. Nelson*, 41 Miss. 83; *State v. Williamson*, 57 Mo. 192; *Brooks v. Walker*, 3 La. Ann. 150; *Grinstead v. Foute*, 26 Miss. 476; *Tyler Cotton P. Co. v. Chevalier*, 56 Ga. 494; *Letcher v. Kennedy*, 3 J. J. Marsh. 701. *Brown v. Gill*, 49 Ga. 549; *Outlaw v. Davis*, 27 Ill. 467; *Tibbs v. Allen*, 27 Ill. 119; *Moore v. Neil*, 39 Ill. 256; *Preston v. Wright*, 60 Iowa, 351; *Tharp v. Com.* 3 Met. (Ky.) 411; *McNitt v. Turner*, 83 U. S. 16 Wall. 352, 21 L. ed. 341; *Reedy v. Scott*, 90 U. S. 23 Wall. 352, 23 L. ed. 109; *Rowe v. Parsons*, 6 Hun, 338; *Mandeville v. Reynolds*, 68 N. Y. 528; *Cromelien v. Brink*, 29 Pa. 522; *State v. Lewis*, 22 N. J. L. 564; *Hudson v. Messick*, 1 Houst. 275; *Brown v. Connelly*, 5 Blackf. 390; *Brackenridge v. Dawson*, 7 Ind. 383; *Morgan v. State*, 12 Ind. 448.

### § 39. The Subject as Treated by Text-Writers and Courts.

a. **By Best.**—The term “presumption,” in its large and comprehensive signification, may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning, from something proved or taken for granted. It is, however, rarely employed in jurisprudence in this extended sense. Like “presumptive evidence,” it has there obtained a restrictive legal signification, and is used to designate an inference, affirmative or disaffirmative, of the existence of some matter of fact, either judicially noticed or admitted, or established by legal evidence to the satisfaction of the tribunal. Best, Ev. § 299.

A very important distinction exists among presumptions of law, namely: that some are absolute and conclusive, called by the common lawyers “irrebuttable presumptions,” and by the civilians “*præsumptiones juris et de jure*,” while others are conditional, inconclusive or rebuttable, and are called by the civilians “*præsumptiones juris tantum*,” or simply, “*præsumptiones juris*.” The former kind has been most accurately defined by the civilians, “*Dispositio legis aliquid præsumendis, et super præsumpto, tan-*

*quam sibi comperto statuentis.*" They add "*Præsumptio juris dicitur, quia lege introducta est; et de jure, quia super tali præsumptione lex inducit firmum jus, et habet eam pro veritate.*" In a word, they are inferences which the law makes so peremptorily, that it will not allow them to be overturned by any contrary proof, however strong. Best, Ev. §§ 305, 306.

b. **By Starkie.**—The term "presumption" has been variously defined by legal writers. It is said to be "the result of a process of reasoning from one fact to another, or from one or more facts to others; an inference. A conclusion, judgment or belief, as to the truth of some matter of fact arrived at and found by a process of inference from other facts." Burr. Circ. Ev. 910. An inference as to the existence of a fact not actually known, arising from its necessary or unusual connection with others which are known. Stark. Ev. 742.

c. **By Phillips.**—A probable inference which our common sense draws from circumstances usually occurring in such cases. 1 Phil. Ev. (4th Am. ed.) 599. A probable consequence drawn from facts, as to the truth of a fact alleged, but of which there is no direct proof. Wills, Circ. Ev. 17. An inference, affirmative or disaffirmative, of the existence of a disputed fact, drawn by a judicial tribunal, by a process of probable reasoning from some one or more matters of fact either admitted in the cause or otherwise satisfactorily established. Best, Presump. 12. It is a conclusion in favor of the existence of one fact from others in proof. *Tanner v. Hughes*, 53 Pa. 289. In the course of legal investigations there are two kinds of presumption which demand attention; one is presumption of fact, the other a presumption of law. 3 Wait, Law and Prac. (5th ed. 1885) 422.

Presumptions of fact are to be decided by the jury within the rules which so clearly separate the office of the judge from that of the jury. "*Ad questionem facti non respondent judices; ad questionem legis non respondent juratores.*" Broom, Leg. Max. 105.

"Presumptions of law are, in reality, rules of law and part of the law itself; and the court may draw the inference whenever the requisite facts are developed, whether in pleading or otherwise, while all other presumptions, however obvious, being only inferences of fact, cannot be made without the intervention of a jury." Best, Presump. 18.

Presumptive evidence and the presumptions of proofs to which it gives rise are not indebted for their probative force to any rules of positive law; but juries, in inferring one fact from others which have been established, do nothing more than apply, under the sanction of the law, a process of reasoning, the force of which rests on experience and observation, and such inferences are presumptions of fact. Best, Presump. 15, § 14; *Morgan v. Ruvey*, 6 Hurlst. & N. 265; *Justice v. Lang*, 52 N. Y. 323.

**d. By Sir James Stephen.**—A “presumption” means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Steph. Dig. Ev. art. 1.

Presumptions from evidence of the existence of particular facts are, in many cases, if not in all, mixed questions of law and fact. If the evidence be irrelevant to the fact insisted on, or be such as cannot fairly warrant a jury in presuming it, the court is so far from being bound to instruct them that they are at liberty to presume it, that it would err in giving such an instruction. *Bank of United States v. Corcoran*, 27 U. S. 2 Pet. 123, 7 L. ed. 369.

**e. By Taylor.**—The general head of presumptive evidence is usually divided into two branches, namely: presumptions of law and presumptions of fact. Presumptions of law consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded, either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. The general doctrines of presumptive evidence are not, therefore, peculiar to municipal law, but are shared by it in common with other departments of science. Taylor, Ev. § 70.

**f. By Judge Grover.**—After a most critical review of the authorities, both state and federal, the conclusion has been reached that by far the most logical definition of a distinction that has baffled the acuteness of the best equipped minds, is one given by the New York Court of Appeals. Judge Grover says: “The distinction between a presumption of law and of fact is, that the former is to be declared and applied by the court in all cases where the facts raising it are established; and the latter is a question for the determination of the jury, who are to exercise their judgment in the particular case, and find the fact, if satisfied of

its truth; or if not so satisfied, refuse to find it." *Stover v. People*, 56 N. Y. 315.

**g. By the Illinois Supreme Court.**—Presumptions of law consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded either upon the first principles of justice, or the law of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. Presumptions of fact are conclusions drawn from particular circumstances. They are such as are found by experience to be usually consequent upon, or coincident with, the facts presumed, and either do not arise, or are rebutted, if they do not correspond with, or are not adequate to account for, the circumstances actually proved. *Sutphen v. Cushman*, 35 Ill. 188.

Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear. *Lincoln v. French*, 105 U. S. 614, 26 L. ed. 1189.

**h. By the Federal Courts.**—From a very early period in our federal legislation, the views embodied in the text have received the sanction of the United States Supreme Court, and in a series of decisions, tabulated with a view to illustration, that court commits itself to a full indorsement and ratification of these presumptions regarding jurisdictional regularity; thus, in *Pennington v. Gibson*, 57 U. S. 16 How. 65, 14 L. ed. 847, the court indulged the presumption in favor of the jurisdiction, and held that this presumption applied no less to decrees of courts of equity than to judgments of courts of law.

Judgment by a court having jurisdiction of the person and subject matter warrants the presumption that the facts which were necessary to be proved to confer jurisdiction were proved. *Erwin v. Lowry*, 48 U. S. 7 How. 172, 12 L. ed. 655; *Grignon v. Astor*, 43 U. S. 2 How. 319, 11 L. ed. 283.

Where the parties have stipulated that the cause was transferred from the state to the circuit court in accordance with the statute, and that all the original files in the cause were destroyed by fire, and both the court and the parties accepted the transfer, it will be presumed that the files did contain conclusive evidence of the existence of the jurisdictional facts. *Pittsburgh, C. & St. L. R. Co. v. Ramsey*, 89 U. S. 22 Wall. 322, 22 L. ed. 823.



§ 40. **Presumptions as to the Acts of a Court of Competent Jurisdiction.**—Every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears. *Voorhees v. Bank of United States*, 35 U. S. 10 Pet. 449, 9 L. ed. 490; *Williams v. United States*, 42 U. S. 1 How. 290, 11 L. ed. 135; *Nations v. Johnson*, 65 U. S. 24 How. 195, 16 L. ed. 628; *Harvey v. Tyler*, 69 U. S. 2 Wall. 328, 17 L. ed. 871; *Baltimore & P. R. Co. v. Sixth Presb. Church*, 91 U. S. 127, 23 L. ed. 260.

The presumption is that the state courts will do what the Constitution and the laws of the United States require; and removals to the United States courts cannot be effected because of fear that they will not. *Chicago & A. R. Co. v. Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636.

Where all the justices of the county court were present and acting at adjourned and special terms, it is to be presumed, in the absence of anything to the contrary, that the terms were regularly called and held. *Dallas County v. McKenzie*, 110 U. S. 686, 28 L. ed. 285.

Where the court has jurisdiction of the parties by the proper service of summons, the rendition of the judgment before the time for filing defendant's answer has expired does not render the judgment void, but only erroneous; and the law, when the judgment is collaterally attacked, will make all presumptions necessary to sustain it, and will assume the judgment to be valid and binding, until reversed in a direct proceeding. *White v. Crow*, 110 U. S. 183, 28 L. ed. 113.

Where a court of general jurisdiction is authorized to bring in, by substituted service, nonresident defendants interested in property within its jurisdiction, but is not required to place the proof of service upon the record, and the court orders such service, it will be presumed, in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record; and a judgment affecting the property will be valid. *Applegate v. Lexington & C. C. Min. Co.* 117 U. S. 255, 29 L. ed. 892.

§ 41. **The Maxim "Lex Loci Rei Sitæ."**—The famous maxim "*Lex loci rei sitæ*" is a cardinal principle of common-law adjudication. It has been recognized from a very early period as of controlling influence in litigation, and the lapse of time and

the inroads of disturbing influences upon other legal propositions have failed to impair or affect the integrity or the status of this.

**a. Review of the Authorities Bearing upon This Maxim.—**

As colonial dependencies of Great Britain, the common law is presumed to exist in the original thirteen States, and also in such other States as have been carved out of the original English Colonies. *Stokes v. Macken*, 62 Barb. 145; *Crouch v. Hall*, 15 Ill. 263; *Thompson v. Monrow*, 2 Cal. 99; *Shepherd v. Nabors*, 6 Ala. 631; *Norris v. Harris*, 15 Cal. 226; *Walker v. Walker*, 41 Ala. 353; *Titus v. Scantling*, 4 Blackf. 89; *White v. Knapp*, 47 Barb. 549; *Brown v. Pratt*, 3 Jones, Eq. 202.

In amplification of this principle, I will paraphrase the statement of a distinguished judge by stating the legal proposition, thus: The law regulating the forum is presumed to regulate the foreign State. *Holmes v. Broughton*, 10 Wend. 73; *Cressey v. Tatom*, 9 Or. 541; *McAnally v. O'Neal*, 56 Ala. 299; *Connor v. Trawick*, 37 Ala. 289; *Averatt v. Thompson*, 15 Ala. 678; *Cox v. Morrow*, 14 Ark. 604; *Abell v. Douglass*, 4 Denio, 305; *Starr v. Peck*, 1 Hill, 270; *Crake v. Crake*, 18 Ind. 156; *Warren v. Lusk*, 16 Mo. 111; *Goodman v. Griffin*, 3 Stew. (Ala.) 160; *Re High*, 2 Doug. (Mich.) 515; *Holmes v. Mullett*, 1 Morris (Iowa) 82; *Davis v. Bowling*, 19 Mo. 651; *Hydrick v. Burke*, 30 Ark. 124; *Dubois v. Mason*, 127 Mass. 37; *Buckinghouse v. Gregg*, 19 Ind. 401; *Schurman v. Marley*, 29 Ind. 459; *Rogers v. Zook*, 86 Ind. 237; *Haden v. Ivey*, 51 Ala. 381; *Evans v. Covington*, 70 Ala. 440; *Brown v. San Francisco Gas Light Co.* 58 Cal. 426; *Alford v. Baker*, 53 Ind. 279; *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461; *Meyer v. McCabe*, 73 Mo. 236.

**b. The Caution of High Authority.**—In this connection it is deemed expedient to cite the practitioner to another inexorable rule of evidence, which is to the effect that foreign laws in all instances must be proved, as the courts refuse to take judicial notice of them. *Andrews v. Herriot*, 4 Cow. 515; *Hosford v. Nichols*, 1 Paige, 220, 2 L. ed. 624; *Male v. Roberts*, 3 Esp. 163; *Mostyn v. Fabrigas*, Cowp. 175; *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249; *Whelan v. Kinsley*, 26 Ohio St. 131; *Pittsburg, Ft. W. & C. R. Co. v. Lewis*, 33 Ohio St. 196; *Leake v. Bergen*, 27 N. J. Eq. 360; *Kline v. Baker*, 99 Mass. 253; *Murphy v. Collins*, 121 Mass. 6; *Cubbedge v. Napier*, 62 Ala. 518; *Champion v. Wilson*, 64 Ga. 184; *Syme v. Stewart*, 17 La. Ann. 73; *Hull v. Augustine*, 23 Wis. 383.

The manner of proof varies according to circumstances. The general principle that the best testimony should be produced applies. *Church v. Hubbard*, 6 U. S. 2 Cranch, 237, 2 L. ed. 265.

**c. Implication of This Maxim with the Rule Requiring Proof of Foreign Laws.**—"In general foreign laws are required to be verified by the sanction of an oath, unless they can be verified by some other high authority, such as the law respects not less than it respects the oath of an individual. The usual mode of authenticating foreign laws is by an exemplification of a copy under the great seal of the State, or by a copy proved to be a true copy by a witness, who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give the copy, which certificate must also be duly authenticated. Story, *Confl. Laws*, § 641; *Lincoln v. Battelle*, 6 Wend. 475; *Brackett v. Norton*, 4 Conn. 517; *Dyer v. Smith*, 12 Conn. 384.

**d. Foreign Laws, how Proved.**—"But foreign, unwritten laws, customs and usages may be proved, and, indeed, must ordinarily be proved, by parol evidence." Story, *Confl. Laws*, § 642; *Donckt v. Thellusson*, 8 C. B. 812; *Brush v. Wilkins*, 4 Johns. Ch. 520, 1 L. ed. 922; *Church v. Hubbard*, *supra*; *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507; *Kenny v. Clarkson*, 1 Johns. 385; *Isabella v. Pecot*, 2 La. Ann. 391; *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 54-64, *Mostyn v. Fabrigas*, Cowp. 174; *De Bode's Case*, 8 Q. B. 208. See also *Pickard v. Bailey*, 26 N. H. 152; *Hall v. Costello*, 48 N. H. 176.

**e. Presumption as to Foreign Law.**—The foreign law will be presumed to be the common law in the absence of rebutting evidence. *National Bank of Michigan v. Green*, 33 Iowa, 140; *Chase v. Alliance Ins. Co.* 91 Mass. 311; *Holmes v. Broughton*, 10 Wend. 75; *Starr v. Peck*, 1 Hill, 270; *Throop v. Hatch*, 3 Abb. Pr. 23; *Cheney v. Arnold*, 15 N. Y. 345; *People v. Brady*, 56 N. Y. 182; *First Nat. Bank of Meadeville v. Fourth Nat. Bank of New York*, 77 N. Y. 320, 33 Am. Rep. 618; *Brown v. Camden & A. R. Co.* 83 Pa. 316; *McDougald v. Carey*, 38 Ala. 320; *Smith v. Munice Nat. Bank*, 29 Ind. 158; *Smith v. Peterson*, 63 Ind. 243; *Webber v. Donnelly*, 33 Mich. 469; *Carpenter v. Grand Trunk R. Co.* 72 Me. 388; *Meyer v. McCabe*, 73 Mo. 236; *Klinck v. Price*, 4 W. Va. 4; *Roethke v. Phillips Best Brew. Co.* 33 Mich. 340.

The statutory law of the forum is not presumed to exist in any other State. *Hill v. Wilkes*, 41 Ga. 449; *Hickman v. Alpaugh*, 21 Cal. 225; *Davis v. Garr*, 6 N. Y. 124; *Wright v. Delafield*, 23 Barb. 498; *Johnson v. Chambers*, 12 Ind. 102; *Leake v. Bergen*, 27 N. J. Eq. 360; *Flanagan v. Packard*, 41 Vt. 561; *Stark Bank v. United States Pottery Co.* 34 Vt. 144; *Kling v. Fries*, 33 Mich. 275; *Hull v. Augustine*, 23 Wis. 383; *Flato v. Mulhall*, 72 Mo. 522; *Murphy v. Collins*, 121 Mass. 6.

§ 42. **Presumption of Continuance.**—Another presumption of law and one that is believed without qualification is this: Where a condition or state of regarding persons or things is shown to exist, that condition or state is presumed to continue till the contrary is shown. *Kidder v. Stevens*, 60 Cal. 415; *Mullen v. Pryor*, 12 Mo. 307; *Eames v. Eames*, 41 N. H. 177; *Garner v. Green*, 8 Ala. 96; *Hood v. Hood*, 2 Grant, Cas. 229; *Gould v. Norfolk Lead Co.* 9 Cush. 338; *Montgomery & W. Pl. Road Co. v. Webb*, 27 Ala. 618.

The law presumes that a fact continuous in its character still continues to exist. A partnership is presumed to continue until a dissolution is proved. Life is presumed to exist, within certain limits. A party being once in possession, is presumed to continue in possession. A corporation once established is presumed to continue. An entry and ouster by a landlord on his tenant is presumed to continue until a restoration be shown. *Wilkins v. Earle*, 44 N. Y. 172.

a. **Views of Commissioner Hunt.**—*Commissioner Hunt*, in the course of the opinion in the above-entitled cause, emphasizes the fact of legal presumption as to the continuance of the former state or condition and, after advertng to other features of the controversy, says: "A partnership once established is presumed to continue. Life is presumed to exist. Possession is presumed to continue. The fact that a man was a gambler twenty months since, justifies the presumption that he continues to be one. An adulterous intercourse is presumed to continue; and so of ownership and nonresidence." The New York cases cited to support this proposition are: *Walrod v. Ball*, 9 Barb. 271; *Sleeper v. Van Middlesworth*, 4 Denio, 431; *Smith v. Smith*, 4 Paige, 432. 3 L. ed. 502; *Cooper v. Dedrick*, 22 Barb. 516; *McMahon v. Harrison*, 6 N. Y. 443.

b. **Miscellaneous Authorities on This Subject.**—Evidence is

introduced tending to show that some years previous, diligent search was made for a certain document, and that it could not be found. The presumption is that it is still lost, and that secondary evidence is admissible. *Poe v. Dorrah*, 20 Ala. 289.

A person is shown to be the owner of personal property with the present right of the possession; the presumption is, that that status of the property continues, and the mere fact that the property is in the possession of another, with the consent of the former owner, does not raise a legal presumption of change of title so as to cast the burden of proof upon the original owner, in order to show that he retains his right of property and his right of possession therein. *Magee v. Scott*, 9 Cush. 148.

c. **Statement of the General Rule.**—The general rule is that things once proved to have existed in a certain state are to be presumed to have continued in that state until the contrary is established by evidence, either direct or presumptive. Unless the rule is to be applied to goods delivered, to be transported over several connecting railroads, there would be no safety to the owner. It would often be impossible for him to prove at what point, or in the hands of which company, the injury happened. But give to such party the benefit of the presumption that the goods he has delivered in good order in such case continued so until they came to the possession of the company which delivers them at the place of destination in a damaged condition, and his rights will be completely protected. The burden is then shifted upon the latter company, of proving that such goods came to its possession in a damaged condition, by way of defense. This proof the latter company can always make much more easily and readily than the converse can be proved by the owner. *Smith v. New York Cent. R. Co.* 43 Barb. 225.

d. **Concise Statements of the Rule by Mr. Justice Johnson and Mr. Chief Justice Dixon.**—There is a most singular absence in reported cases bearing upon the question of presumption as here considered. One would suppose that cases of the kind must have frequently arisen, but only one directly in point has been cited, and I know of no other. It is *Smith v. New York Cent. R. Co.*, 43 Barb. 225. The decision was affirmed in the Court of Appeals at the December Term, 1869, but the case in that court is unreported. See index "Unreported Cases," 41 N. Y. 620. The reasons for applying the presumption, that the condition of a

thing once proved is presumed to continue until the contrary is shown, are well stated by Johnson, *J.*, in 43 Barb. 228–229. See also opinion of Dixon, *Ch. J.*, in *Laughlin v. Chicago & N. W. R. Co.* 28 Wis. 204; also *Welch v. Sackett*, 12 Wis. 257; *Farr v. Payne*, 40 Vt. 615; *Elmore v. Naugatuck R. Co.* 23 Conn. 482.

In *Laughlin v. Chicago & N. W. R. Co.*, *Ch. J.* Dixon said: “The presumption claimed and relied upon is, that a particular state of things being once proved, that state is presumed to have continued until the contrary is established by evidence either direct or presumptive. The position is, that the cloths being proved to have been in the boxes at the time of their delivery to the Atlantic and Great Western Railway Company, the presumption of law is, that they continued therein until the boxes came to the possession of the defendant, unless the contrary be shown, the burden of which rests upon the defendant.”

For further authorities sustaining the theory of the text in reference to this presumption, see *Eames v. Eames*, 41 N. H. 177; *Beckwith v. Whalen*, 65 N. Y. 322; *Graves v. State*, 12 Wis. 593.

**e. Commentary by Sir James Stephen; Authorities Sustaining His Views.**—*Sir James Stephen*, in commenting upon the principle under review, says: “This, like all presumptions, is a very vague and fluid rule at best, and is applied to a great variety of different subject matters.” *Note 37* to art. 101, Dig. Ev. (Chase’s ed. 1885).

It must be borne in mind that presumptions from evidence of the existence of particular facts are mixed questions of law and fact. *Bank of United States v. Corcoran*, 27 U. S. 2 Pet. 121, 7 L. ed. 368.

Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. *Lincoln v. French*, 105 U. S. 614, 26 L. ed. 1189; *Fresh v. Gilson*, 41 U. S. 16 Pet. 327, 10 L. ed. 982.

Analogy seems to enforce the rule that where evidence has shown the insolvency of the maker of a promissory note, at the time of its maturity, the presumption is that he was insolvent when the action was brought (*Body v. Jewsen*, 33 Wis. 402); and so, where bankruptcy is shown to have existed a few months previous to a given time, it will be presumed to have continued so. *Donahue v. Coleman*, 49 Conn. 464.

The same presumptions that apply to questions of insolvency, partnership and life, hold good with reference to the cognate

topics of domicil and nonresidence. *Church v. Rowell*, 49 Me. 367; *Goldie v. McDonald*, 78 Ill. 605; *Daniels v. Hamilton*, 52 Ala. 105; *Eaton v. Woydt*, 26 Wis. 383; *Rixford v. Miller*, 49 Vt. 319; *Chicopee v. Whately*, 6 Allen, 508.

The law presumes that a fact continuous in its character still continues to exist, until a change is shown; as that a life still continues, or that a partnership proved to exist still continues; and so a state of war, proved to exist three years ago, is in law presumed to be still existing, unless the contrary be shown, but the law indulges no presumption at the present time that it will continue three years longer. The law will not indulge in any presumption in regard to a future condition of war or peace. God alone knows what the future has in store for nations, and finite courts, whose visions cannot penetrate the future, should not speculate as to its probabilities, much less attempt to solve them and make them the basis of their judgments. The rule is reasonable which presumes the continuance of an existing fact at the time of the trial, for the other party can overthrow it by proof if it be not so; but when it presumes a future continuance, the party has no ability to unfold the future and give an answer by his proof. The only safe rule is to limit the presumption of continuance up to the commencement of the suit, as was done in *Hambleton v. Veere*, 2 Saund. 169, or, at the furthest, up to the time of the trial, as in *Covert v. Gray*, 34 How. Pr. 450.

**f. The Statute of Limitations in Its Relations to This Phase of the Law.**—The Statutes of Limitations have given vigor and zest to this presumption, and as such Statutes are a well-recognized feature in the organic or written law of every State in the American Union, reference to them must be had for verification of the rule announced by the caption. The presumption of payment obtains in all cases where the evidence shows a lapse of twenty years since the obligation sought to be enforced was first incurred. This is with the proviso, of course, that no interest has been paid, and no collateral writing or other incident repels the presumption of payment. *Brock v. Savage*, 31 Pa. 422; *Bellas v. Levan*, 4 Watts, 295; *Cowie v. Fisher*, 45 Mich. 629; *Ludlow v. Van Camp*, 6 N. J. Eq. 113, 11 Am. Dec. 529; and see *Levy v. Merrill*, 52 How. Pr. 360; *Rodman v. Hoop*, 1 U. S. 1 Dall. 85, 1 L. ed. 47; *Hopkirk v. Page*, 2 Brock. 20; *Boyce v. Lake*, 17 S. C. 481; *Jarvis v. Albro*, 67 Me. 310; *Olden v. Hubbard*, 34 N. J. Eq. 85; *Boon v. Pierpont*, 28 N. J. Eq. 7;

*Goodwyn v. Baldwin*, 59 Ala. 127; *Lyon v. Adde*, 63 Barb. 89; *Ray v. Pearce*, 84 N. C. 485; *Pattie v. Wilson*, 25 Kan. 326; *Willingham v. Chick*, 14 S. C. 93; *Sumner v. Child*, 2 Conn. 610; *Central Bank of Troy v. Heydorn*, 48 N. Y. 260.

It is said that after a commission *de lunatico inquirendo* has been duly returned, or after "inquest found," the presumption of sanity is changed. *State v. Wilner*, 40 Wis. 304.

By the common law, the lapse of twenty years, without explanatory circumstances, affords a presumption of law that the debt is paid, even although it be due by specialty. *Oswald v. Leigh*, 1 T. R. 270; *Lesley v. Nones*, 7 Serg. & R. 410; Best, Presump. § 137; *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466 (1883).

Payment of a bond will not be presumed from the lapse of less than twenty years, exclusive of time in which the plaintiff was under legal disability to sue. *Dunlop v. Ball*, 6 U. S. 2 Cranch, 180, 2 L. ed. 246.

The presumption is indulged that running accounts, claims for interest, taxes imposed and rent accrued are from their nature obligations that common prudence and forethought would make some provision for, and the law assumes the payment of such claims after the lapse of a reasonable period. *Decker v. Livingston*, 15 Johns. 479; *Crompton v. Pratt*, 105 Mass. 255; *Holydon v. Wight*, 36 Me. 326; *Brewer v. Knapp*, 1 Pick. 337; *Attleborough v. Middleborough*, 10 Pick. 378; *Robbins v. Townsend*, 20 Pick. 345.

### § 43. Presumptions Regarding the Absolute Payment by Promissory Notes.

**a. Rebuttal Evidence as to This Presumption.**—It has been already intimated that the presumption of law, in respect to the character of payment, when it is made by a note or bill, is not conclusive, but may be rebutted by proof of a contrary intention, whether the presumption was in favor of its absolute or conditional character.

**b. Authorities Bearing upon This Subject Collated.**—In some of the cases it has been held that the presumption could be rebutted by proof of an express agreement to the contrary, especially to rebut the presumption of a conditional payment (*Tiedeman*, Com. Paper, § 380; *Muldon v. Whitlock*, 1 Cow. 290; *Hays v. Stone*, 7 Hill, 128; *Dougal v. Cowles*, 5 Day, 511; *Boyd v. Hitchcock*, 20 Johns. 76; *Conkling v. King*, 10 Barb. 372; *Booth*



*v. Smith*, 3 Wend. 66; *Glenn v. Smith*, 2 Gill & J. 493; *Butts v. Dean*, 2 Met. 76; *Appleton v. Parker*, 15 Gray, 173; *Follett v. Steele*, 16 Vt. 30; *Thom v. Wilson*, 27 Ind. 370; *Comstock v. Smith*, 23 Me. 202; *Shumway v. Reed*, 34 Me. 560; *Iowa Co. v. Foster*, 49 Iowa, 676); but the better opinion is that the agreement may be implied from the surrounding circumstances. *Miller v. Lumsden*, 16 Ill. 161; *Gordon v. Price*, 10 Ired. L. 385; *Hart v. Boller*, 15 Serg. & R. 162; *Johnson v. Cleaves*, 15 N. H. 332; *Merrick v. Boury*, 4 Ohio St. 60; *Fulford v. Johnson*, 15 Ala. 385; *Berry v. Griffin*, 10 Md. 27; *Slocumb v. Holmes*, 1 How. (Miss.) 139; *White v. Howard*, 1 Sandf. 81; *Harris v. Lindsay*, 4 Wash. C. C. 98, 271. As a rule, however, the mere acknowledgment of payment in full, or of payment in general, could not be sufficient to rebut the presumption of conditional payment without the aid of corroborating circumstances (*Mailard v. Argyle*, 6 Man. & G. 40; *Muldon v. Whitlock*, 1 Cow. 290; *Putnam v. Lewis*, 8 Johns. 389; *Tobey v. Barber*, 5 Johns. 68; *M' Lughan v. Bovard*, 4 Watts, 308; *Hotchin v. Secor*, 8 Mich. 494; *Dudgeon v. Haggart*, 17 Mich. 273; *Burchard v. Frazer*, 23 Mich. 228; *Berry v. Griffin*, 10 Md. 27; *Steamboat Charlotte v. Hammond*, 9 Mo. 58; *Gardner v. Gorham*, 1 Dougl. (Mich.) 507; *Feamster v. Withrow*, 12 W. Va. 651; *Maze v. Miller*, 1 Wash. C. C. 328. But see, *contra*, *Barron v. How*, 2 Mart. N. S. 144. A "receipt in full when paid" can only mean conditional payment. *Dayton v. Trull*, 23 Wend. 345); but it has been held that the words "received and accepted in satisfaction," coupled with the giving of security in the shape of an indorsement by a third party, will establish the presumption of an absolute payment. *Morriss v. Harvey*, 75 Va. 726.

§ 44. **Presumption of Intent.**—There is no juridical postulate better understood and so universally conceded as the presumption of intent.

a. **Persons of Sound Mind and Discretion Presumed to Intend Ordinary Acts.**—Persons of sound mind and discretion must in general be understood to intend, in the ordinary transactions of life, that which is the necessary and unavoidable consequence of their acts. *First Nat. Bank of Clarion v. Jones*, 88 U. S. 21 Wall. 325, 22 L. ed. 542. But this presumption is not indulged as regards the remote consequences of such acts. *Nicol v. Crittenden*, 55 Ga. 497.

**b. Fraudulent Intent Never to be Presumed.**—A fraudulent intent is never presumed, and all courts require positive proof of the alleged fraud. It is not presumed either as a matter of law or of fact, unless under circumstances not fairly susceptible of any other interpretation. *Tucker v. Moreland*, 35 U. S. 10 Pet. 58, 9 L. ed. 345; *Gaines v. Nicholson*, 50 U. S. 9 How. 356, 13 L. ed. 172; *Prevost v. Gratz*, 19 U. S. 6 Wheat. 481, 5 L. ed. 311; *Conard v. Nicoll*, 29 U. S. 4 Pet. 291, 7 L. ed. 862; *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; *Gregg v. Sayre*, 33 U. S. 8 Pet. 244, 8 L. ed. 932; *Hager v. Thompson*, 66 U. S. 1 Black, 80, 17 L. ed. 41.

**c. Intention of Parties a Fact to be Proved.**—"The intention of a party is a fact to be proved as all other facts are proved, not, indeed, necessarily by direct evidence or by the proof of other facts indicative of such intention, and from which facts its actual existence and operation may be inferred. The law makes no conclusive presumption in regard to it. Indeed, the law never conclusively presumes that a person intended to violate the law or commit a fraud. The act done and the circumstances attending its commission may indicate more or less clearly the intention of the party doing it, and authorize an inference of more or less weight in regard to such intention." *Quinebaugh Bank v. Brewster*, 30 Conn. 559; *Jones v. Ricketts*, 7 Md. 108; *Hart v. Roper*, 6 Ired. Eq. 349; *Butler v. Livingstone*, 15 Ga. 565; *The Atalanta*, 6 C. Rob. Adm. 440; *Foster v. Charles*, 6 Bing. 396; *Knapp v. White*, 23 Conn. 529; *Pontifex v. Bignold*, 3 Man. & Gr. 63; *Ex parte Craven*, L. R. 10 Eq. 648; *Van Pelt v. McGraw*, 4 N. Y. 110.

**d. Presumption of Intent Rebuttable by Competent Evidence.**—This presumption of intent is rebuttable, and competent evidence may be introduced to show that a party did not intend the probable consequences of his acts. *Filkins v. People*, 69 N. Y. 101; 2 Stark. Cr. 691; *Sinclair's Case*, 2 Lew. 49; *Griffin v. Parsons*, 1 Russ. Cr. 755g; *William's Case*, 1 Leach, 533, 1 East, P. C. 424.

**e. Further Presumption That a Person Intends to Do What is within His Power and Right to Do.**—There is a further presumption that a person intends to do what is within his power and right to do, rather than attempt something beyond the legitimate scope of either. This presumption is expressed by the

Supreme Court of Georgia in an early case, and has never been expressly overruled as a postulate of presumption. *Pool v. Morris*, 29 Ga. 374.

**f. Corporations Subject to the Presumption of Intent.—**

Corporations are subjected to the presumption of intent as well as individuals. This proposition is abundantly settled by authority. *Selma & T. R. Co. v. Tipton*, 5 Ala. 787; *Hale v. Union Mut. F. Ins. Co.* 32 N. H. 295; *Little Rock & N. R. Co. v. Little Rock, M. R. & T. R. Co.* 36 Ark. 663.

**g. Review of the Celebrated Case of *Curtis v. Leavitt*; Views of Chief Judge Comstock.—**The principle which fastens upon corporate bodies the presumption of intent is ably stated in one of the most celebrated cases that ever came before the New York Court of Appeals. In *Curtis v. Leavitt*, 15 N. Y. 9, *Ch. J.* Comstock announces a principle that ably discloses the present attitude of the law of evidence in regard to the subject of intent when applied to corporate actions. "It has been urged that the debtor corporation must be deemed to have intended the result of its own acts. This is very often a useful rule of evidence in arriving at a conclusion upon a question of motive and intention, but it is not a rule of law. If a given result must, by plain and absolute necessity, follow from a particular action, or if it be so likely to follow that no two minds of equal intelligence could differ in conclusion, viewing the subject from the same point of observation as the actor himself, then there would be no injustice in holding that he intended such result. Still, the question is one of fact: What was the intent?"

**h. Qualification of the Rule Stated by Justice Hubbard.—**

It is said that a party must be supposed to intend the natural result of his condition and acts. But this proposition must be received with qualifications. The result cannot always be relied upon as evidence of the imputed intent. We must judge of the acts as they appeared to the debtor at the time they were transacted, not as they appear to the observer after the result is known. We all know that an embarrassed debtor often goes on after his condition is irretrievable, with confident hopes of relief. *Jones v. Howland*, 8 Met. 386, 387, *per* Hubbard, *J.*

**§ 45. Presumption of Life.**

**a. These Presumptions Cautiously Indulged.—**Presumptions in reference to life and death should be indulged with caution,

and no one can look through the adjudged cases on this subject without being convinced that the legitimate limits of presumption have too frequently been overlooked. There are many cases in the books which cannot be considered as law, and which are condemned by the best commentators. *O'Gara v. Eisenlohr*, 38 N. Y. 302.

**b. Views of Mr. Gresley.**—It has been well and truly said by Mr. Gresley, in his valuable treatise on Equity Evidence, while considering this subject, that the power of directing the jury to what length they might venture has often been stretched beyond due limits by the judges, for, in cases of hardship, they have urged juries to presume facts which were manifestly incredible. pp. 272, 273. And such are the cases of *King v. Twynning*, 2 Barn. & Ald. 386, and *Wilkinson v. Payne*, 4 T. R. 468, both of which have been severely criticised; and Eyre, *Ch. B.*, characterized the latter case as one of "presumption run mad." It must be confessed that decisions of this kind, requiring courts and jurors to presume facts to be true, which are probably, if not obviously, false, are pernicious, and ought not to be followed. The presuming of absurdities in order to meet the exigencies of a particular case must ever be fraught with mischief. Best, *Presump.* 47.

Where evidence discloses the fact that a person has been seen alive, he is presumed to be alive at the present time, unless there is conclusive proof to the contrary, or the presumption of death is indulged. *King v. Fowler*, 11 Pick. 302; *Way v. Illinois Cent. R. Co.* 40 Iowa, 342; *Morrison v. New York Cent. & H. R. R. Co.* 63 N. Y. 643; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Lowe v. Foulke*, 103 Ill. 58; *Hall v. Com. Hardin (Ky.)* 480; *Battin v. Bigelow*, 1 Pet. C. C. 453; *Innis v. Campbell*, 1 Rawle, 375; *Fulweiler v. Baugher*, 15 Serg. & R. 45; *Pennefather v. Pennefather*, 1 R. 6 Eq. 171.

**c. Presumptions should be Made upon the Common Principles of Induction.**—Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction. I am aware that many of the elementary writers have said that presumptions may be looked upon as bold inferences pushed further than the facts established will strictly warrant. Gresley, *Eq. Ev.* 372. This is undoubtedly true, as applied to some of the adjudged cases, like *Wilkinson v. Payne*, where, a jury having presumed a

marriage, which, under the circumstances, was contrary almost to possibility, *Lord Ellenborough* refused a new trial.

**d. An Extreme Case Considered.**—These extreme cases of forced and extravagant presumptions are very justly dealt with by *Sir W. D. Evans*. See appendix to *Pothier*, Cont. 331, where he says: “The principle adopted in *Wilkinson v. Payne* is certainly very dangerous in its tendency, as it goes to subvert the main foundations of the distinction between truth and falsehood.” He adds: “Many cases must occur in the administration of justice, when the wishes of those who are to decide must, from the nature of the circumstances, be in opposition to the legal rights; but if we once begin to shake the rule, that the law is to command and the judges to obey; if we once admit the propriety of professing to believe as true, what we are actually convinced is not so,—nobody can say where the deviation will stop, and legal certainty will be sacrificed at the shrine of judicial discretion.” These views are quoted with approbation by *Gresley* at page 374. *Mr. Starkie*, in speaking of this case of *Wilkinson v. Payne*, and of *Standen v. Standen*, cited in 4 T. R. 469, says it may be very questionable whether such decisions are not only contrary to sound policy, but even positively mischievous. He adds: “Do they not afford temptation to juries in hard cases, to trifle with the sacred obligation of an oath.” 2 *Starkie*, Ev. 686, *note f*. I very much doubt the soundness of the principle of law which allows a technical force and efficacy to be given to evidence, which warrants such presumptions, beyond its mere natural tendency to convince the mind. *O’Gara v. Eisenlohr*, *supra*.

By legislative enactment, the State of Georgia in 1831 granted a tract of land to the soldiers of the Revolutionary War. In 1857, in an action brought, the question as to the death of a grantee (*Tindal*) became one of the issues, and the court refused to hold as a presumption of law that *Tindal* was dead. *Watson v. Tindal*, 24 Ga. 494.

**e. Presumption of Suicide not to be Indulged.**—The New York general term in a recent case has held that where a person is found dead, the presumptions are that his death was natural or accidental, unless the evidence shows him to have been insane. The court further held that suicide can not be presumed. The mere fact of death in an unknown manner creates no such presumption. Upon evenly balanced testimony, the law assumes innocence

rather than crime. Preponderating evidence is necessary to establish the latter. *Germain v. Brooklyn L. Ins. Co.* 26 Hun, 604.

**f. Ordinary Term of Life not Presumed to Exceed Ninety-nine Years.**—*Lord Hale* is authority for the statement that it will be presumed life will not exceed ninety-nine years (*Weale v. Lower*, Pollex, 54); and it may be inferred that a man will not live eighty years longer. *Napper v. Sanders*, Hutton, 118.

#### § 46. Presumption of Death.

**a. Raised by Continuous Absence for Seven Years.**—The protracted absence of a person from his home and friends for a period of seven years, during which time he is not heard from, raises the presumption of death. *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Rice v. Lumley*, 10 Ohio St. 596; *Holmes v. Johnson*, 42 Pa. 159; *Primm v. Stewart*, 7 Tex. 183; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086; *Adams v. Jones*, 39 Ga. 508; *Proctor v. M'Call*, 2 Bail. L. 298; *Lajoie v. Primm*, 3 Mo. 529; *Hoyt v. Newbold*, 45 N. J. L. 219; *Stevens v. McNamara*, 36 Me. 176; *Doe v. Flanagan*, 1 Ga. 538; *Spears v. Burton*, 31 Miss. 554; *Ashbury v. Sanders*, 8 Cal. 62; *Godfrey v. Schmidt*, 1 Cheves, Eq. 57; *Moffit v. Varden*, 5 Cranch, C. C. 658; *Crawford v. Elliott*, 1 Houst. (Del.) 465; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Smith v. Knowlton*, 11 N. H. 196; *King v. Paddock*, 18 Johns. 141; *Bradley v. Bradley*, 4 Whart. 173; *Loring v. Steinman*, 1 Met. 210.

**b. No Presumption as to the Time of Death Arises from Mere Absence.**—Although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if anyone has to establish the precise period during those seven years at which such person died, he must do so by evidence and can neither rely, on the one hand, on the presumption of death, nor, on the other, upon the continuance of life. These views are in harmony with the settled laws of the English courts, as will be seen from an examination of the authorities (*Re Phene's Trust*, L. R. 5 Ch. App. 139; *Hopewell v. De Pinna*, 2 Campb. 113; *Reg. v. Lumley*, L. R. 1 C. C. 196; *Re Lewe's Trust*, L. R. 11 Eq. Cas. 236; *Dunn v. Snowden*, 32 L. J. Ch. 104; *Lambe v. Orton*, 29 L. J. Ch. 286; *Re Benham's Trust*, 37 L. J. Ch. 265), including the leading case in the court of exchequer of *Nepean v. Knight*, 2 Mees. & W. 894, in error from the court of king's

bench. In that case *Lord Denman, Ch. J.*, said: "We adopt the doctrine of the court of king's bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." To the same effect is the preponderance of authority in this country. *McCartee v. Camel*, 1 Barb. Ch. 456, 5 L. ed. 453; *Lancaster v. Washington L. Ins. Co.* 62 Mo. 121; *Stouvenel v. Stephens*, 2 Daly, 319; *Hancock v. American L. Ins. Co.* 62 Mo. 26; *Stevens v. McNamara*, 36 Me. 176; *Whiting v. Nicholl*, 46 Ill. 230; *Smith v. Knowlton*, 11 N. H. 191; *Flynn v. Coffee*, 12 Allen, 133; *Loring v. Steinman*, 1 Met. 204; *Spurr v. Trimble*, 1 A. K. Marsh. 278; *Doe v. Flanagan*, 1 Ga. 538; *Smith v. Smith*, 49 Ala. 156; *Gibbes v. Vincent*, 11 Rich. L. 323.

c. **Statement of the North Carolina Rule.**—And such seems to be the settled doctrine in North Carolina. In *State v. Moore*, 11 Ired. L. 160, the chief justice of the supreme court said: "The rule as to the presumption of death is, that it arises from the absence of the person from his domicile without being heard from for seven years. But it seems rather to be the current of authorities that the presumption is only that the person is then dead, namely, at the end of seven years; but that the presumption does not extend to the death having occurred at the end, or any particular time within, that period, and leaves it to be judged of as a matter of fact according to the circumstances, which may tend to satisfy the mind, that it was at an earlier or later day." The question again arose in the subsequent case of *Spencer v. Roper*, 13 Ired. L. 333-334, when that court re-affirmed *Spencer v. Moore*, and, referring with approval to the doctrine announced by the court of king's bench in *Doe v. Nepean*, 5 Barn. & Ad. 86, 2 Mees. & W. 894, said: "Where a party has been absent seven years without having been heard of, the only presumption arising is that he is then dead; there is none as to the time of his death."

d. **Authorities Cited by Mr. Justice Harlan.**—For an exhaustive review of the authorities sustaining this presumption, see the opinion of *Mr. Justice Harlan* in *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086. See also *Whiting v. Nicholl*, 46 Ill. 230; *Youngs v. Heffner*, 36 Ohio St. 232; *Adams v. Jones*, 39 Ga. 479; *Wentworth v. Wentworth*, 71 Me. 72; *Smith v. Smith*, 49 Ala. 156.

e. **Death, how Proved.**—Any evidence calculated to negative

the presumption of life is competent as proof of death. *Anderson v. Parker*, 6 Cal. 197; *Ruloff v. People*, 18 N. Y. 179; *Crough v. Eveleth*, 15 Mass. 305; *John Hancock Mut. Ins. Co. v. Moore*, 34 Mich. 41; *Bailey v. Bailey*, 25 Mich. 185; *Scheel v. Eidman*, 77 Ill. 304; *Jackson v. Etz*, 5 Cow. 319.

**f. Importance of This Presumption in Criminal Law.—**

The presumption of life or death is one of great importance in criminal law, and a more detailed discussion is reserved for a succeeding volume. For an elaborate discussion of the principles underlying this presumption, see the opinion of *Ch. J. Johnson* in *Ruloff v. People*, 18 N. Y. 179.

Mr. Wills, in his *Treatise on Circumstantial Evidence*, says: "Death may be inferred from such strong and unequivocal circumstances that render it morally certain and leave no ground for doubt."

**§ 47. Presumption of Survivorship.**

**a. No Speculative Presumption as to the Order in Which Two Persons Die.**—The law will not indulge in any speculative presumption as to the order in which two persons die, even where the death is occasioned by the same casualty. *Newell v. Nichols*, 75 N. Y. 78; *Pell v. Ball*, 1 Chev. Eq. 99; *Coye v. Leach*, 8 Met. 371; *Smith v. Croom*, 7 Fla. 81-180; *Moehring v. Mitchell*, 1 Barb. Ch. 264, 5 L. ed. 379; *Taylor v. Diplock*, 2 Phill. Eccl. Rep. 261, 3 Hagg. Eccl. Rep. 748; *Wright v. Netherwood*, Evans' ed. of Salk. 593, notes; *Mason v. Mason*, 1 Meriv. 308; *Re Murray*, 1 Curt. 596; *Re Lewe's Trusts*, L. R. 11 Eq. 236; *Underwood v. Wing*, 31 Eng. L. & Eq. 293, 4 DeG. McN. & G. 633; *Underwood v. Wing*, 19 Beav. 459; *Re Lewis' Trusts*, 40 L. J. Ch. 602; *Re Phene's Trust*, L. R. 5 Ch. App. 139. The burden of proof rests on the party to whom the survivorship would have been beneficial. *Pell v. Ball*, 1 Chev. Eq. 99.

**b. Death Occasioned by Catastrophe Raises no Presumption of Survivorship.**—Where several persons, some male and some female, perish in a common catastrophe, and there is no positive evidence of which perished first, there is no presumption that the males survived the longest, but it would be presumed that they all perished together. So held in the case of a mother and her infant son. *Stinde v. Goodrich*, 3 Redf. 89. There is no presumption of law arising from age or sex as to the survivorship among persons whose death is occasioned by one and the same cause;



nor is there any presumption that they all died at the same time, but the burden of proof is on the one asserting the affirmative. Reasoning disapproved in *Newell v. Nichols*, 12 Hun, 617. See *Moehring v. Mitchell*, 1 Barb. Ch. 264, 5 L. ed. 379.

§ 48. **Presumption of Sanity.**—In any action, civil or criminal, should the question of insanity become one of any importance, reliance may be had upon this postulate of law which attributes to every person the possession of his faculties. Where the contrary is alleged it must be proved. *Lilly v. Waggoner*, 27 Ill. 395; *State v. Pike*, 49 N. H. 399; *Stubbs v. Houston*, 33 Ala. 555; *Thornton v. Appleton*, 29 Me. 300; *Cordrey v. Cordrey*, 1 Houst. (Del.) 269; *Burton v. Scott*, 3 Rand. 399; *United States v. McGlue*, 1 Curt. 1; *Runyan v. Price*, 15 Ohio St. 1; *Cotton v. Ulmer*, 45 Ala. 378; *Furrell v. Brennan*, 32 Mo. 328; *State v. Smith*, 53 Mo. 267; *Porter v. Campbell*, 2 Baxt. 81; *Saxon v. Whitaker*, 30 Ala. 237; *Harris v. Ingledew*, 3 P. Wms. 91; *Dyce Sombre v. Troup*, 1 Deane, Eccl. Rep. 38; *Den v. Vancleve*, 4 Wash. C. C. 262; *Jackson v. Van Dusen*, 5 Johns. 158; *Jackson v. King*, 4 Cow. 207; *Reese v. Stille*, 38 Pa. 138; *Egbert v. Egbert*, 78 Pa. 326; *Anderson v. Cranmer*, 11 W. Va. 584; *Weed v. Mutual Ben. L. Ins. Co.* 70 N. Y. 561; *Brown v. Torrey*, 24 Barb. 583; *Walter v. People*, 32 N. Y. 147; *Gardner v. Gardner*, 22 Wend. 526; *State v. Smith*, 53 Mo. 267. In *Weed v. Mutual Ben. L. Ins. Co.*, *supra*, it was said: "The sanity of every individual is presumed, and insanity cannot be presumed from the mere fact of suicide."

### § 49. **Presumption of Legitimacy.**

a. **Present Status of the Rule.**—The ancient policy of the law of England remains unaltered. A child born of a married woman is to be presumed to be the child of the husband, unless there is evidence which excludes all doubt that the husband could not be the father. But in modern times the rule of evidence has varied. Formerly it was considered that all doubt could not be excluded unless the husband were *extra quatuor maria*. But as it is obvious that all doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every species of legal evidence tending to the same conclusion. But still the evidence must be of a character to exclude all doubt; and when

the judges in the *Banbury Case* (not reported) spoke of satisfactory evidence upon this subject they must be understood to have meant such evidence as would be satisfactory, having regard to the special nature of the subject. *Head v. Head*, 1 Sim. & Stu. 150.

The above is the present status of the law in both England and the United States.

**b. Want of Access may be Shown.**—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown—

(1) Either that his mother and her husband had not access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband;

(2) Or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred. Steph. Dig. Ev. art. 98.

**c. Presumption of Legitimacy Rebuttable.**—The presumption of legitimacy may be rebutted both by positive and by presumptive evidence. *Wright v. Hicks*, 12 Ga. 155, 15 Ga. 160.

In Louisiana this legal presumption can be overcome only in the mode and the time prescribed by law. *Dejoul v. Johnson*, 12 La. Ann. 853.

Elsewhere it can be overcome only by clear and convincing proof of non-intercourse between the husband and wife. *Egbert v. Greenwalt*, 44 Mich. 250; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 378, 5 L. ed. 423; *Patterson v. Gaines*, 47 U. S. 6 How. 550, 12 L. ed. 553; *Sullivan v. Kelly*, 3 Allen, 148; *Hemmenway v. Towner*, 1 Allen, 209; *Flettesham v. Julian*, 1 Y. B. 7 Hen. IV. 9, pl. 13; *Stegall v. Stegall*, 2 Brock. 256; *Cannon v. Cannon*, 7 Humph. 410.

**d. Doubt and Suspicion not Indulged.**—The presumption of legitimacy of the child born during the period of marriage is not rebutted by circumstances which create only doubt and suspicion, but is wholly removed by showing, *first*, that the husband was incompetent; *second*, that he was entirely absent, so as to have no

access to the mother; *third*, or entirely absent during the period when the child must, in the course of nature, have been begotten; *fourth*, and present only under circumstances which afford clear and satisfactory proof that there was no sexual intercourse. *Hargrave v. Hargrave*, 9 Beav. 552; *Com. v. Stricker*, Append. to 1 Browne (Pa.) 47.

**e. Presumption of Legitimacy of Child Born in Wedlock.—**

Bastards are persons begotten and born out of wedlock. *Miller v. Anderson*, 1 West. Rep. 810, 43 Ohio St. 473; 1 Bl. Com. 454; 2 Kent, Com. 208.

If a woman pregnant at her marriage is delivered after marriage the child is legitimate. *Miller v. Anderson, supra*.

The law presumes a child to have been born in lawful wedlock, and this presumption must prevail until overcome by clear and convincing proof adduced by those alleging illegitimacy. *Orthwein v. Thomas*, 4 L. R. A. 434, 127 Ill. 554.

Children of a married woman, born during coverture, are presumed to be legitimate. *Re Romero*, 75 Cal. 379.

The fact that a woman gave birth to a fully developed child so soon after marriage as to render it certain that it was begotten before marriage, raises a legal presumption that it was begotten by him who became her husband. *McCulloch v. McCulloch*, 69 Tex. 682.

The presumption of legitimacy is a presumption *juris et de jure*. *Miller v. Anderson*, 1 West. Rep. 811, 43 Ohio St. 473.

**f. Burden of Proving Illegitimacy.**—The burden of proving illegitimacy lies entirely with the person seeking to establish it. *Overlock v. Hall*, 81 Me. 348; *Plowes v. Bossey*, 8 Jur. N. S. 352, 31 L. J. N. S. Ch. 681.

But in a later decision in England it has been held that it is not a presumption *juris et de jure*, but may be rebutted by evidence which must be clear and conclusive and not resting merely on a balance of probabilities. So where a child was born 276 days after the last opportunity of the husband's access, and there was evidence in the wife's conduct tending to show that she considered the child the offspring of her paramour, the question of its legitimacy was properly submitted to the jury. *Bosvile v. Atty-Gen.* L. R. 12 Prob. Div. 177; *Morris v. Davies*, 5 Clark & F. 163.

**g. When Legal Presumption Relieves from Proof.—A**

legal presumption relieves him in whose favor it exists from the necessity of any proof, but may be destroyed by rebutting evidence. Otherwise as to presumptions *juris et de jure*, against which no proof can be admitted. *Dugas v. Estiletts*, 5 La. Ann. 559; *Davenport v. Mason*, 15 Mass. 85; *Baalam v. State*, 17 Ala. 451.

The presumption in favor of the legitimacy of children will not be made where the question is to be determined as one of fact and not of law. *Blackburn v. Crawford*, 70 U. S. 3 Wall. 175, 18 L. ed. 186.

**h. What Evidence Necessary to Bastardize.**—Declarations of parties made after cohabitation has ceased are not evidence to bastardize the issue. *Re Taylor*, 9 Paige, 611, 4 L. ed. 836.

They are not admissible where no evidence is offered of non-access at the time of conception. *Dennison v. Page*, 29 Pa. 420.

Neither the mother's declarations nor her husband's, she having since deceased, are admissible on the questions of paternity (*Cope v. Cope*, 5 Car. & P. 604, 1 Moody & R. 269); but a baptismal register describing the child as the illegitimate son of his mother is admissible. *Ibid.*

**i. Father's Declarations Insufficient.**—The father's declarations are insufficient to bastardize the issue of his marriage. *Bowles v. Bingham*, 2 Munf. 442, 3 Munf. 599. The proof must show that it is impossible that the husband could be the child's father. *Vernon v. Vernon*, 6 La. Ann. 243.

But where non-access has been established by evidence *aliunde*, the declaration of the mother is admissible to prove the paternity of the child. *Legge v. Edmonds*, 25 L. J. N. S. Ch. 125.

Admissions of the wife cannot be received to establish non-access at the period of conception to bastardize her issue. *Cross v. Cross*, 3 Paige, 139, 3 L. ed. 89.

**j. Likeness as Regards the Question of Paternity.**—Evidence of a likeness of a child to its supposed father is not admissible upon the question of paternity (*United States v. Collins*, 1 Cranch, C. C. 592; *Hanawalt v. State*, 64 Wis. 84. But consult *State v. Bowles*, 7 Jones, L. 579); nor is evidence of the color of the child's eyes admissible. *People v. Carney*, 29 Hun, 47.

**k. Illegitimacy may be Established by Proof of Other Facts.**—Illegitimacy may be established by any competent evidence, and proof thereof is not restricted to evidence of im-

tency on the part of the husband, or of impossibility of access, or of intercourse between the wife and a man other than her husband. *Wilson v. Babb*, 18 S. C. 59.

Hearsay evidence may be sufficient. *Goerman's App.* (Pa.) 1 Cent. Rep. 228.

Depositions are admissible on the trial of an issue of bastardy, as in other civil actions. *State v. Hickerson*, 72 N. C. 421.

The fact of paternity may be established by a fair preponderance of evidence as in other civil cases. *People v. Cantine*, 1 Mich. N. P. 140; *Young v. Makepeace*, 103 Mass. 50.

**1. Evidence of Intercourse with Other Men.**—Evidence of intercourse with other men must be limited to a period such as to permit of the inference that the child derived its paternity from that intercourse. *Bowen v. Reed*, 103 Mass. 46. Compare *Paull v. Padelford*, 16 Gray, 263.

Evidence that another man had connection with the wife at about the proper time for begetting the child is not competent unless coupled with evidence that the husband had no connection with her at that time. *State v. Bennett*, 75 N. C. 305.

Evidence of acts of intercourse with other men twelve months before the birth is inadmissible. *Sabins v. Jones*, 119 Mass. 167.

The legal presumption is rebutted by the facts that the wife led the life of a prostitute, was seen as such in company with other men; that though her husband lived in the same town, he always avoided her, and that the child was born in jail three years after their separation. *Sibbet v. Ainsley*, 3 L. T. N. S. 583.

So illegitimacy is established by evidence of the mother living in adultery at the time when the child was begotten. *Barony of Saye and Sele*, 1 H. L. Cas. 507.

**m. Proof of Non-access.**—Access between man and wife is always presumed, until otherwise plainly proved, and nothing is allowed to impugn the legitimacy of the child short of proofs of facts showing it to be impossible that the husband could have been its father. *Gaines v. Hennen*, 65 U. S. 24 How. 553, 16 L. ed. 770.

But if a husband went beyond seas two years before the child was born, the conclusion is irresistible that the child is illegitimate. *Rex v. Maidstone*, 12 East, 550.

So illegitimacy may be shown by proof of abandonment by the husband, and his continued absence from the State for a period of four years before the birth of the child. *Pittsford v. Chittendon*, 2 New Eng. Rep. 191, 58 Vt. 49.

Non-access of the husband need not be proved during the whole period of the wife's pregnancy, if the circumstances show a natural impossibility that he could be the father, as where he had access only a fortnight before the birth. *Rex v. Luffe*, 8 East, 193.

Where a husband after a long absence did not rejoin his wife until eight months before the birth of a full-grown child, he could not have been the father. *Heathcote's Divorce Bill*, 1 Macq. H. L. Cas. 535.

Opportunity of access becomes important to consider where the wife was notoriously living in adultery. *Reg. v. Mansfield*, 1 Q. B. 444, 5 Jur. 505.

Where the child was born three months after the marriage the wife was asked on cross-examination, "When did you first become acquainted with your husband?" and on her answering "Twelve months," the subject was dismissed. *Anon v. Anon*, 22 Beav. 481; *State v. Romaine*, 58 Iowa, 48.

Where husband and wife, although living separate and apart, had been in such a situation that access might have been had, the presumption in favor of legitimacy can only be rebutted by strong evidence, and if the access is proved no inquiry as to paternity can be made. *Morris v. Davies*, 5 Clark & F. 163, 1 Jur. 911.

**n. Parties Themselves not Competent Witnesses on the Subject of Access.**—A woman cannot give evidence of the non-access of her husband, to bastardize her issue, though the husband be deceased (*Rex v. Kea*, 11 East, 132; *Goodright v. Moss*, Cowp. 591); but the mother is competent to prove the illegitimacy of her children. *Rex v. Bramley*, 6 T. R. 330; *Standen v. Stunden*, 6 T. R. 331, *note b*, Peake, N. P. 32; *Rex v. Reading*, Cas. t. Hardw. 79; *Rex v. Luffe*, 8 East, 193; *Tioga Co. v. South Creek Twp.* 75 Pa. 433.

The evidence of the husband is not admissible to prove access, or any collateral fact tending to show that he had opportunities of access. *Wright v. Holdgate*, 3 Car. & K. 158.

The rule precluding the husband or wife from proving non-access for the purpose of bastardizing the issue applies where, on the day following the marriage, the husband abandoned the wife, and the child was born shortly afterward at the house of her employer, whom she sought to charge with paternity. *Tioga Co. v. South Creek Twp. supra*; *Parker v. Way*, 15 N. H. 45; *Davis v. Houston*, 2 Yeates, 289; *Page v. Dennison*, 1 Grant, Cas. 377;

*Dennison v. Page*, 29 Pa. 420; *State v. Wilson*, 10 Ired. L. 131; *State v. Herman*, 13 Ired. L. 502; 1 Phil. Ev. 87, *note*.

**o. Proof of Impotency of Husband.**—It is presumed that a mature male has normal powers of virility, and the burden of proving the contrary is on the party asserting it. *Gardner v. State*, 81 Ga. 144.

The presumption of legitimacy arising from the sleeping together of husband and wife can be rebutted only by clear and satisfactory evidence that some physical incapacity existed. *Legge v. Edmonds*, 25 L. J. N. S. Ch. 125.

The evidence must prove beyond all reasonable doubt that the husband could not have been the father. *Phillips v. Allen*, 2 Allen, 453.

The impotency of the putative father, if true and proven, would be conclusive, and evidence thereof is competent. *State v. Broadway*, 69 N. C. 411.

### § 50. Presumption of Domicil.

**a. Once Acquired Presumed Continued.**—A domicil once acquired is presumed to continue until it is shown to have been changed. This principle applied to one who, during the war, went from his home in a loyal State to a disloyal one. *Mitchell v. United States*, 88 U. S. 21 Wall. 350, 22 L. ed. 584.

**b. Lord Westbury's Statement of the Rule.**—*Lord Westbury* states the rule with rare felicity: "In the administration of the law, the idea of domicil should exist, and the fact of domicil should be ascertained, in order to determine which of two municipal laws should be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicil. Domicil, therefore, is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicil, and that domicil remains his fixed attribute until a new and different attribute usurps its place." *Bell v. Kennedy*, L. R. 1 H. L. Sc. 320.

**c. Domiciliary Relations Perpetuate Themselves.**—The pivotal idea embraced in this presumption is that domiciliary relations once shown to exist are presumed to perpetuate themselves. Even in the presence of an intent to abandon the law will still presume the continuance of the old domicil, and however

fixed and irrevocable the intent may be to establish a permanent residence elsewhere, the presumption will survive the intent, and nothing short of actual and continued residence will repel this inference of the law. *Chicopee v. Whately*, 6 Allen, 508; *Prather v. Palmer*, 4 Ark. 456; *Daniels v. Hamilton*, 52 Ala. 105; *Walker v. Walker*, 1 Mo. App. 404; *Church v. Rowell*, 49 Me. 367; *Littlefield v. Inhabitants*, 50 Me. 475; *Rixford v. Miller*, 49 Vt. 319; *Greenfield v. Camden*, 74 Me. 56; *Goldie v. McDonald*, 78 Ill. 605; *Eaton v. Woydt*, 26 Wis. 383.

### § 51. Presumption of Negligence.

**a. How Established.**—To establish “presumption of negligence” the accident must first be connected with the defendant by direct evidence, either that the act was his or under his control. *Higgs v. Maynard*, 12 Jur. N. S. 705; Smith, Neg. (Whit. ed.) 421; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 693; *Wright v. Midland R. Co.* L. R. 8 Exch. 137, 42 L. J. N. S. Exch. 89.

The phrase cannot apply to cases where it is open to doubt whether plaintiff was not himself negligent, where there are reciprocal duties. *Cotton v. Wood*, 29 L. J. N. S. C. P. 333.

**b. Not Assumed where Proper Care is Shown.**—Where the jury finds that the negligence arises from circumstances over which defendant has no control, and he has exercised proper care, he is not liable in an action for negligence. *Hammack v. White*, 11 C. B. N. S. 588, 31 L. J. N. S. C. P. 129; *Latch v. Rumner R. Co.* 27 L. J. N. S. Exch. 155; *Wakeman v. Robinson*, 1 Bing. 213; *Gibbons v. Pepper*, 1 Ld. Raym. 38; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145.

**c. Mere Happening of Accident not Sufficient to Establish.**—The mere fact of an accident happening is not evidence of negligence. *Bird v. Great Northern R. Co.* 28 L. J. N. S. Exch. 3; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 698; *Smith v. Great Eastern R. Co.* L. R. 2 C. P. 10.

Where an accident happens from a breach of duty it must not only appear that it happened, but the surrounding circumstances must be such as to raise the presumption that it happened in consequence of a failure of duty on the part of the defendant towards the plaintiff. Article, *Res Ipsa Loquitur*, 10 Chic. L. J. 261; 2 Thomp. Neg. 1220; Whart. Neg. §§ 421, 422.

**d. Fact of Killing does not Establish.**—The fact of killing



or injury, in the absence of any statutory provision to that effect, does not constitute of itself any presumption of negligence. *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Indianapolis & C. R. Co. v. Means*, 14 Ind. 30; *Schneir v. Chicago, R. I. & P. R. Co.* 40 Iowa, 337; *Flattes v. Chicago, R. I. & P. R. Co.* 35 Iowa, 191; *Kentucky Cent. R. Co. v. Talbot*, 78 Ky. 621; *New Orleans, J. & G. N. R. Co. v. Enochs*, 42 Miss. 603; *Brown v. Hannibal & St. J. R. Co.* 33 Mo. 309; *Walsh v. Virginia & T. R. Co.* 8 Nev. 111; *Lyndsay v. Connecticut & P. R. R. Co.* 27 Vt. 643. See, however, *Roberts v. Johnson*, 58 N. Y. 613; *Memphis & O. R. Packet Co. v. McCool*, 83 Ind. 392.

An accident may, however, be of such a character as to raise a presumption of negligence. *Edgerton v. New York & H. R. Co.* 39 N. Y. 227; *Mullen v. St. John*, 57 N. Y. 567; *Lyons v. Rosenthal*, 11 Hun, 46; *Breene v. New York Cent. & H. R. R. Co.* 11 Cent. Rep. 891, 109 N. Y. 297; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236.

**e. Rule in Actions Based on Contracts.**—But in actions resting on contracts, as when an accident happens to a passenger on a railroad by reason of the defective condition of appliances, it is prima facie evidence from which the jury may infer negligence. *Baltimore & O. R. Co. v. Noell*, 132 Gratt. 394; *Sawyer v. Hannibal & St. J. R. Co.* 37 Mo. 240; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534. Other examples cited in Smith on Negligence (Whit. ed.), 424, are: where injury is caused by car being thrown off the track (*Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Cleveland, C. C. & I. R. Co. v. Newell*, 1 West. Rep. 890, 104 Ind. 264); by a collision of trains (*New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242); by explosion of a boiler (*The Reliance*, 4 Woods, C. C. 420); by the breaking down of a coach (*Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80); by the upsetting of a stage coach (*Wall v. Livezey*, 6 Colo. 465; *Boyce v. California Stage Co.* 25 Cal. 460), or of a sleigh. *Ryan v. Gilmer*, 2 Mont. 517.

## § 52. Presumptions Arising from Lapse of Time and Notorious Possession.

**a. This Rule One of Convenience and Policy.**—This rule of presumption when traced to its foundation is a rule of convenience and policy, the result of the necessary regard for the peace

and security of society. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. *Foulk v. Brown*, 2 Watts, 214.

The postulate we are called upon to support is this: Where the evidence discloses that proprietary rights and privileges have been exercised without objection or demurrer for a long period of time, there is a legal presumption that such rights repose upon grant, devise or license, and are of lawful origin.

**b. Conveyance Presumed from Lapse of Time.**—The law presumes a conveyance from lapse of time (*Field v. Brown*, 24 Gratt. 74; *Brown v. M'Kinney*, 9 Watts, 565; *Valentine v. Piper*, 22 Pick. 85; *Jackson v. McCall*, 10 Johns. 377; *Fitzhugh v. Croghan*, 2 J. J. Marsh, 429; *Rooker v. Perkins*, 14 Wis. 79; *Frost v. Brown*, 2 Bay, 133; *Marr v. Gilliam*, 1 Coldw. 488; *Grimes v. Bastrop*, 26 Tex. 310; *Taylor v. Watkins*, 26 Tex. 688; *Rhodes v. Whitehead*, 27 Tex. 304; *Tinkham v. Arnold*, 3 Me. 120; *Brattle Square Church Proprs. v. Bullard*, 2 Met. 363); as a deed (*Hepburn v. Auld*, 9 U. S. 5 Cranch, 262, 3 L. ed. 96; *Weatherhead v. Baskerville*, 52 U. S. 11 How. 329, 13 L. ed. 717; *Townsend v. Downer*, 32 Vt. 183; *Newman v. Studley*, 5 Mo. 291; *Blair v. Marks*, 27 Mo. 579; *Chiles v. Conley*, 2 Dana, 22), or a lease (*Sellick v. Starr*, 5 Vt. 255); and title to property generally from possession. *Birmingham v. Anderson*, 40 Pa. 506; *Youngman v. Linn*, 52 Pa. 413; *Duke v. Thompson*, 16 Ohio, 35; *Society Prop. Gosp. v. Young*, 2 N. H. 310; *Cambridge v. Lexington*, 17 Pick. 222; *Fritz v. Brandon*, 78 Pa. 342; *Jackson v. McCall*, 10 Johns. 377; *Casey v. Inloes*, 1 Gill, 430; *Berthelemy v. Johnson*, 3 B. Mon. 90; *McCorry v. King*, 3 Humph. 267; *Hoey v. Furman*, 1 Pa. 295; *Jackson v. Moore*, 13 Johns. 516; *Alexander v. Walter*, 8 Gill, 239; *Lenoir v. Ruiney*, 15 Ala. 667; *McCall v. Doe*, 17 Ala. 533; *Sparks v. Rawls*, 17 Ala. 211; *Wilson v. Glenn*, 68 Ala. 383; *Hanford v. Fitch*, 41 Conn. 486; *Crow v. Marshall*, 15 Mo. 499; *Colvin v. Warford*, 20 Md. 358; *Frantz v. Ireland*, 66 Barb. 386.

### § 53. Presumption of Identity.

**a. Shown by Identity of Name.**—Identity is shown *prima facie* by identity of name. *Trebilcoæ v. McAlpine*, 46 Hun, 469, citing *Hatcher v. Rocheleau*, 18 N. Y. 86; *Reynolds v. Staines*,

2 Car. & K. 745; *Gitt v. Watson*, 18 Mo. 274; *Cates v. Loftus*, 3 A. K. Marsh. 202. But see *Mooers v. Bunker*, 29 N. H. 420.

b. **May be Repelled.**—But this presumption may be repelled. *Jackson v. Goes*, 13 Johns. 518, (1825); *Jackson v. King*, 5 Cow. 237; *Jackson v. Cady*, 9 Cow. 140; *Campbell v. Wallace*, 46 Mich. 320; *Givens v. Tidmore*, 8 Ala. 745; *Trimble v. Brichta*, 10 La. Ann. 778; *Douglas v. Dakin*, 46 Cal. 49; *Cates v. Loftus*, 3 A. K. Marsh. 202; *Hamsher v. Kline*, 57 Pa. 397; *Atchison v. McCulloch*, 5 Watts, 13; *Bogue v. Bigelow*, 29 Vt. 179; *Phillips v. Evans*, 64 Mo. 17; *State v. Moore*, 61 Mo. 279; *Gitt v. Watson*, 18 Mo. 274; *Flournoy v. Warden*, 17 Mo. 435; *Brown v. Metz*, 33 Ill. 339; *Balbec v. Donaldson*, 2 Grant, Cas. 460; *Brotherline v. Hammond*, 69 Pa. 128; *Hunt v. Stewart*, 7 Ala. 527.

If required, some evidence beyond that of mere identity of name must be given that the plaintiff is the same person who is entitled to an interest in real estate. *Mooers v. Bunker*, 29 N. H. 420.

c. **The Rule Condensed.**—If we were to attempt a summary of the presumptions of identity, it would be in this language: They are always determined from the circumstances surrounding. *Morris v. Landaur*, 48 Iowa, 234.

## § 54. Presumption of Innocence.

a. **Wide Acceptation of This Rule.**—One of the first presumptions the law indulges is that of innocence, and it is a principle of equally wide acceptation that he who alleges a fraud must prove it. *Blaisdell v. Cowell*, 14 Me. 370; *Sutter v. Lackmann*, 39 Mo. 91; *New Portland v. Kingfield*, 55 Me. 172; *Reeves v. Dougherty*, 7 Yerg. 222; *Watkins v. Watkins*, 2 Atk. 97; *Hewlett v. Hewlett*, 4 Edw. Ch. 8, 6 L. ed. 780; *Greenwood v. Lowe*, 7 La. Ann. 197; *Hager v. Thompson*, 66 U. S. 1 Black, 80, 17 L. ed. 41; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Ex parte Knowles*, 2 Cranch, C. C. 576; *Paxton v. Boyce*, 1 Tex. 317.

It follows that the presumption of law is in favor of innocence and against fraud, and this presumption is of universal acceptation. *Cole v. Germania F. Ins. Co.* 99 N. Y. 36 (1885).

The principles growing out of the presumption of innocence have been universally extended to all cases calling for their application. *Rex v. Twynning*, 2 Barn. & Ald. 386.

Justice Harris, in his opinion in the case of *Clayton v. Wardell*,

4 N. Y. 237, says that when there is a conflict of presumptions the rule is that that must yield which has the least degree of probability to sustain it. The presumption of innocence and against the commission of crime and immorality does not always prevail in the conflict. *O'Gara v. Eisenlohr*, 38 N. Y. 302. Presumptions of fact are but inferences drawn from other facts and circumstances in the case and should be made upon the common principles of induction. *Id.* 303; *Squire v. State*, 46 Ind. 459; *Hutto v. State*, 7 Tex. App. 44; *Sharp v. Johnson*, 22 Ark. 79; *Klein v. Laudman*, 29 Mo. 259; *West v. State*, 1 Wis. 209.

b. **Party Alleging Guilt must Prove It.**—The general rule of our jurisprudence is that the party accused need not establish his innocence, but it is for the government itself to prove his guilt. *United States v. Gooding*, 25 U. S. 12 Wheat. 460, 6 L. ed. 693, opinion by Story, *J.*

### § 55. Presumption of Knowledge.

a. **Universality of This Presumption.**—Of all the presumptions indulged by the law, none is more notorious than the presumption which attributes to every man a knowledge of the law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. *Lyon v. Richmond*, 2 Johns. Ch. 51, 1 L. ed. 292. See also the following cases collated in a singularly exhaustive note appended to the case last cited in the Lawyers' edition: *Rochester v. Alfred Bank*, 13 Wis. 432; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *Bank of United States v. Daniel*, 37 U. S. 12 Pet. 32, 9 L. ed. 989; *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174, 5 L. ed. 589, 26 U. S. 1 Pet. 1, 7 L. ed. 27; *Dill v. Shahan*, 25 Ala. 694; *Hardigree v. Mitchum*, 51 Ala. 151; *Smith v. McDougal*, 2 Cal. 586; *Kenyon v. Welty*, 20 Cal. 637; *DeGive v. Healey*, 60 Ga. 391; *Jenkins v. German Lutheran Cong.* 58 Ga. 125; *Thurmond v. Clarke*, 47 Ga. 500; *Davis v. Bagley*, 40 Ga. 181; *Goltra v. Sanasack*, 53 Ill. 456; *Heavenridge v. Mondy*, 49 Ind. 434; *Gebb v. Rose*, 40 Md. 387; *Bryant v. Mansfield*, 22 Me. 360; *Garnar v. Bird*, 57 Barb. 277; *Stoddard v. Hart*, 23 N. Y. 566; *Lyon v. Sanders*, 23 Miss. 530; *McMurray v. St. Louis Oil Mfg. Co.* 33 Mo. 377; *Otteneheimer v. Cook*, 10 Heisk. 309; *Bledsoe v. Nixon*, 68 N. C. 521; *Jacobs v. Morange*, 47 N. Y. 57; *Smith v. Penn*, 22 Gratt. 402; *Zollman v. Moore*, 21 Gratt. 313; *Mellish v. Robertson*, 25 Vt.

603; *Proctor v. Thrall*, 22 Vt. 262; *Hinchman v. Emans*, 1 N. J. Eq. 100; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Peters v. Florence*, 38 Pa. 194.

b. **The Maxim “Ignorantia Legis Neminem Excusat.”**—“A maxim has been cited, which, it has been argued, imputes to every person a knowledge of the law. The maxim is ‘*ignorantia legis neminem excusat*,’ but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts.” *Watrous v. Rodgers*, 16 Tex. 410. The maxim has been denied controlling influence in the case of beneficiaries and trustee relations generally. For the limitations placed upon the rule, see *Adair v. Brimmer*, 74 N. Y. 539.

c. **Wharton’s View.**—Mr. Wharton says [Law of Evidence in Civil Cases (3d ed.) § 1240]: “All persons subject to a law are irrebuttably presumed to know what it is (1 Hale, 42; *Reg. v. Price*, 11 Ad. & El. 727; *Middleton v. Crofts*, 2 Str. 1056; *Stewart v. Stewart*, 6 Clark & F. 966; *Kelly v. Solari*, 9 Mees. & W. 54; *Rogers v. Ingham*, L. R. 3 Ch. Div. 351; *Rex v. Esop*, 7 Car. & P. 456; *Reg. v. Good*, 1 Car. & K. 185; *Stokes v. Salomons*, 9 Hare, 79; *Reg. v. Hoatson*, 2 Car. & K. 777; *Rex v. Bailey*, 1 Russ. & R. C. C. 1; *Stockdale v. Hansard*, 9 Ad. & El. 131; *Reg. v. Coote*, L. R. 4 P. C. 599, 9 Moore, P. C. N. S. 463; *Barronet’s Case*, 1 El. & Bl. 1; *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174, 5 L. ed. 589; *Morgan v. United States*, 113 U. S. 477, 28 L. ed. 1044; *United States v. Learned*, 11 Int. Rev. Rec. 149; *The Ann*, 1 Gall. 62; *United States v. Anthony*, 11 Blatchf. 200; *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Freeman v. Curtis*, 51 Me. 140; *Pinkham v. Gear*, 3 N. H. 163; *Com. v. Bagley*, 7 Pick. 279; *Wheaton v. Wheaton*, 9 Conn. 96; *Shotwell v. Murray*, 1 Johns. Ch. 512, 1 L. ed. 227; *Champlin v. Layton*, 18 Wend. 407; *Clarke v. Dutcher*, 9 Cow. 674; *Hampton v. Nicholson*, 23 N. J. Eq. 427; *Menges v. Oyster*, 4 Watts & S. 20; *Good v. Herr*, 7 Watts & S. 253; *Carpenter v. Jones*, 44 Md. 625; *Goltra v. Sanasack*, 53 Ill. 456; *Winehart v. State*, 6 Ind. 30; *Black v. Ward*, 27 Mich. 191), though this, as we have seen, is an axiom of law rather than a presumption. That the axiom contains an untruth is conceded. No man, in a civilized community, knows the law either intensively or extensively; there is no thinker, no matter how profound, who has not left some depths unfathomed; no reader, no matter how omnivorous, who has not left some details untouched. To

predicate that of the ignorant which cannot be predicated of the learned specialist is absurd; but predicated it is, both of ignorant and learned, so far as to establish the conclusion that no one is allowed to set up ignorance of law as an excuse for wrong.

**d. Argument of Mr. Livingston.**—"Besides," objects Mr. Livingston, in his report on the Louisiana Penal Code, "is it not a mockery to refer me to the common law of England? Where am I to find it? Who is to interpret it for me? If I should apply to a lawyer for the book that contained it, he would smile at my ignorance, and, pointing to about five hundred volumes on his shelves, would tell me those contained a small part of it; that the rest was either unwritten or might be found in books that were in London or New York, or that it was shut up in the breasts of the judges at Westminster Hall. If I should ask him to examine his books and give me the information which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years could not be gratuitously imparted. Your law, therefore, I repeat, is absurd in its consequences, if taken literally, and mocks us by a reference to an inaccessible source for an explanation of its obscurities." See also *Martindale v. Falkner*, 2 C. B. 720, Maule, *J.*; *Reg. v. Tewksbury*, L. R. 3 Q. B. 629; *Cutter v. State*, 36 N. J. L. 125.

### § 56. Presumption as to the Date of a Document.

**a. Rule from Stephen's Digest.**—The following suggestive paragraph bears its own comment and indicates a salutary rule of evidence: "When any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed; but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practiced, and would, if practiced, injure any person, or defeat the objects of any law." Steph. Dig. Ev. art. 85.

**b. No Presumption Indulged as to Forged Instruments.**—In respect to a forged instrument there is no presumption of delivery at its date or at any particular time. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

**c. All Presumptions Subject to Rebuttal.**—It is an inseparable incident of all presumptions that they are the legitimate subjects of rebutting evidence, and hence liable to discrediting testimony that may completely subvert all of the intendments and inferences the law raises in their favor. *Parke v. Neeley*, 90 Pa. 52; *Smith v. Shoemaker*, 84 U. S. 17 Wall. 630, 21 L. ed. 717. And here is an important distinction systematically overlooked by attorneys of high repute,—assuming that as a formidable array of authority support the proposition that the date of a letter is prima facie evidence of the time it was written (*Hunt v. Massey*, 5 Barn. & Ad. 903; *Anderson v. Weston*, 6 Bing. N. C. 296; *Butler v. Mountgarret*, 7 H. L. Cas. 633), the prima facie evidence is therefore sufficient to sustain their contention until assailed by more convincing testimony; in other words they rely upon the familiar principle that a presumption as to the date casts the burden of proof upon the party denying it. *Mr. Justice Miller*, in the case of *Smith v. Shoemaker*, above cited, indicates with rare precision the distinction. I wish to emphasize his exposition, as it is all that could be desired: “Many authorities are cited to show that, while the date found in an instrument may be disputed or disproved by other evidence, it is prima facie to be taken as the true date. All cases, however, have reference to the case of an instrument which has been admitted in evidence on other and sufficient ground, and where the true date has become important on some other issue than the admission of the letter. It is a most vicious example of reasoning in a circle, to admit the letter to prove the time when it was written, and assume this to be the real date for the purpose of admitting the letter.”

§ 57. **Presumptions as to Alluvion and Riparian Rights.**—Alluvion is presumed to belong to the owner of the land where it is formed (*Saulet v. Shepherd*, 71 U. S. 4 Wall. 508, 18 L. ed. 446); but before there can be any right to accretion, there must be evidence of an estate to which the accretion can attach. *Ibid.*

The riparian proprietor obtains his title to alluvion as an accession to his land. It is considered as a part of his former estate, at the moment it becomes incorporated with it. He establishes his rights against a claimant by showing that his property adjoins the river and that the land in dispute is alluvion. According to the Code, the property of the river shores belongs to those who

own the adjoining lands. The right to alluvion is inseparable from this ownership. See *Graves v. Fisher*, 5 Me. 69; *Cochran v. Fort*, 7 Mart. N. S. 626; *Cire v. Rightor*, 11 La. 142.

The evidence should show that the addition was formed gradually and imperceptibly by the water to which the land is contiguous. *St. Clair County v. Lovington*, 90 U. S. 23 Wall. 46, 23 L. ed. 59.

This somewhat obscure topic receives very satisfactory treatment in the foot-note appended to the last above-entitled cause in the Lawyers' edition of the Reports.

§ 58. **Views of Sir James Stephen.**—*Sir* James Stephen's treatment of this subject is very unsatisfactory and he is at hopeless discord with the best judicial sentiments of this country, in that he would relegate the entire subject to different branches of the substantive law. He says: "I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the substantive law, and to be unintelligible, except in connection with them. Take for instance the presumption that everyone knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the law of evidence. It belongs to the criminal law. In the same way numerous presumptions as to rights of property (on particular easements and incorporeal hereditaments) belong, not to the law of evidence, but to the law of real property. The only presumptions which, in my opinion, ought to find a place in the law of evidence are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule that a man not heard of for seven years is presumed to be dead might be equally applicable to a dispute as to the validity of a marriage, an action of ejectment by a reversioner against a tenant *pur auter vie*, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the substantive law."

In every branch of substantive law, there are presumptions more or less numerous and important, which can be understood only in connection with those branches of the law. Such are the



presumptions as to the ownership of property, as to consideration for a bill of exchange, as to many of the incidents of the contract of insurance. Mr. Stephen entirely ignores a vast mass of these presumptions and only treats of those which bear upon the proof of facts likely to be proved on a great variety of different occasions, and those estoppels only which arise out of matters of fact, as distinguished from those which arise upon deeds or judgments.

§ 59. **Extended Citation of Authority.**—A presumption, like a *prima facie* case, remains available to the party in whose favor it arises until overcome by countervailing evidence. Authorities cited in *Louisville, N. A. & C. R. Co. v. Thompson*, 5 West. Rep. 837, 107 Ind. 442, citing *Bates v. Pickett*, 5 Ind. 22; *Adams v. State*, 87 Ind. 573, 575; *Cleveland, C. C. & I. R. Co. v. Newell*, 1 West. Rep. 890, 104 Ind. 264.

The law of evidence requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on groundless inferences. *Cole v. Boardman*, 2 New Eng. Rep. 716, 63 N. H. 580.

A presumption in favor of good faith will outweigh a presumption of payment. *Louisville, N. A. & C. R. Co. v. Thompson*, 5 West. Rep. 837, 107 Ind. 442.

A person eighty years old, so physically and mentally prostrated as to be of unsound mind and incapable of comprehending the nature of a contract, will not be presumed from lapse of time to have recovered her reason. *Physio-Medical College v. Wilkinson*, 6 West. Rep. 585, 108 Ind. 314. The presumption as to the continuance of insanity is one of fact, varying with the particular case. *Ibid.*

The law will not presume against the validity of a contract relating to a proper subject matter. *Commiskey v. Williams*, 2 West. Rep. 605, 20 Mo. App. 606.

In the absence of proof the common law of another State will be presumed the same as the common law of the State of trial. *White v. Chaney*, 3 West. Rep. 276, 20 Mo. App. 389; *Silver v. Kansas City, St. L. & C. R. Co.* 3 West. Rep. 284, 21 Mo. App. 5.

A corporation is conclusively presumed to be composed of citizens of the State or nation which chartered it or from which it derives its power. *Susquehanna & Wyoming Valley Railroad & C. Co. v. Blatchford*, 78 U. S. 11 Wall. 172, 20 L. ed. 179.

The fact that a person was alive at a certain time affords the presumption that he was alive a month later. *Com. v. McGrath*, 1 New Eng. Rep. 515, 140 Mass. 450.

Mere proof that a person has left his former place of residence, and if living would be 90 or 100 years of age, will not raise a presumption of death, without evidence also that during the period of his absence his relatives and acquaintances have not heard of him. *Shriver v. State*, 3 Cent. Rep. 230, 65 Md. 278.

The rule that after the lapse of seven years the death of the absentee will be presumed does not apply to the time when within the seven years the death in fact occurred. *Johnson v. Johnson*, 1 West. Rep. 622, 114 Ill. 611. The jury may find the fact from the lapse of a shorter time when circumstances raise presumption of death. *Ibid.*

Absence for ten years raises the presumption of death sufficient to issuing letters of administration upon the estate of the absentee. *Re Nolting*, 43 Hun, 456.

The Statute, which provides that death shall be presumed after an absence from the State for seven successive years, unless proof be made that the person was alive within that time, was not intended to exclude all presumptive evidence of death, where it does not appear that the party left the State. The non-appearance of depositors at a bank for twenty years, and the failure to claim their deposits, are circumstances sufficient to raise the presumption of death. *Bank of Louisville v. Trustees of Public Schools*, 83 Ky. 219.

Where there are conflicting presumptions the presumption of innocence will prevail against the presumption of the continuance of life; the presumption of the continuance of things generally; the presumption of marriage, and the presumption of chastity. *Waddingham v. Waddingham*, 4 West. Rep. 834, 21 Mo. App. 609.

No presumptions arise in favor of the actions of inferior tribunals, or officers of municipal corporations. *Corn v. Cameron*, 2 West. Rep. 146, 19 Mo. App. 573.

It must be assumed that the party who makes an offer of evidence which is excluded has competent testimony to establish the facts unless objection is made on the ground. *Millerstown v. Frederick*, 5 Cent. Rep. 281, 114 Pa. 435.

The presumption is always in favor of honesty and fair dealing, and remains available to the party in whose favor it arises, until

overcome by countervailing evidence. The fact that on a dead man's body is found a pass issued to another person will not create a presumption of fraudulent possession. *Louisville, N. A. & C. R. Co. v. Thompson*, 5 West. Rep. 833, 107 Ind. 442.

All favorable presumptions will be made against a forfeiture of a grant. *Gonzales v. Ross*, 120 U. S. 605, 30 L. ed. 801. By the rules of law, possession of real property will be presumed to accompany ownership, until the contrary is proved; and constructive possession consequent upon legal ownership is sufficient as against mere trespassers. *Ibid.*

Long-continued possession and use of property creates a presumption of lawful origin; and this presumption need not rest upon a belief that a conveyance was in point of fact executed. *Fletcher v. Fuller*, 120 U. S. 534, 30 L. ed. 759. The presumption of a grant is indulged merely to quiet long possession which otherwise might be disturbed by reason of inability to produce muniments of title, actually given but lost, or which parties had neglected to obtain, and of which the witnesses have passed away, or their recollection become dimmed or imperfect. *Ibid.*

The mere evidence of a debt is presumed to follow the owner wherever he resides. *Corn v. Cameron*, 2 West. Rep. 145, 19 Mo. App. 573.

Upon proof of delivery of a telegraphic message for transmission, the presumption arises that the message reached its destination. *Oregon Steamship Co. v. Otis*, 1 Cent. Rep. 734, 100 N. Y. 446. A letter will be presumed to have been mailed in the usual manner, in the absence of proof to the contrary, where the writer testifies he sent it. If the person to whom it was mailed does not deny its receipt, the jury is authorized in finding that it was received. *Ibid.*

The mailing of a letter read on the trial of the case created no legal presumption, but was proper testimony to be considered by the jury, together with the other evidence, in determining when it was received. *Sullivan v. Kuykendall*, 82 Ky. 483.

The presumption is that it is for the best interest of a child to be left with its father, rather than to be given to its grandparents. *Weir v. Marley*, 6 L. R. A. 672, 99 Mo. 484.

The term "beer," in the absence of all evidence as to its quality and effect, does not import an intoxicating beverage. *Blatz v. Rohrbach*, 6 L. R. A. 669, 116 N. Y. 450.

The presumption is to be indulged that the trustee under a trust deed did those acts *in pais* which were conditions precedent to a valid exercise of the power of sale; but such presumption is not conclusive, and its force and effect may be impaired by any competent evidence. *Tyler v. Herring*, 67 Miss. 169.

A thing once proved to exist is presumed to continue only as long as is usual with things of that nature, and it is not correct to say that it is presumed to continue until the contrary is shown. *Scott v. Wood*, 81 Cal. 398.

In the absence of evidence to the contrary, an alteration in a deed will be presumed to have been properly made contemporaneously with its execution. *Kendrick v. Latham*, 25 Fla. 819.

"Louis E. Fink" and "Louis Fink" are presumptively the same person. *Fink v. Manhattan R. Co.* 24 Abb. N. C. 81.

Testamentary capacity is always to be presumed; and such presumption stands until overcome by the weight of the testimony impeaching it. *Newhard v. Yundt*, 132 Pa. 324.

The mere fact that an accident occurred which caused an injury is not generally of itself sufficient to authorize an inference of negligence. *Dobbins v. Brown*, 119 N. Y. 188.

A state of facts once shown to exist is presumed to continue until the contrary is shown. *Pope v. Kansas City Cable R. Co.* 99 Mo. 400.

If the record shows that tax rolls have been deposited in the office where the records of the parish are kept, the assessment will be presumed to have been correctly made; and the burden of proof is on the tax debtor to make out his charge of illegality. *Oteri v. Parker*, 42 La. Ann. 374.

A note signed by individual members of a partnership is prima facie evidence of individual indebtedness. *Cribb v. Morse*, 77 Wis. 322.

If the archives of the country embracing the period when a Mexican grant purports to have been made furnish no information on the subject a strong presumption arises against the validity of the instrument. *Davis v. California Power Works*, 84 Cal. 617.

Possession of animals reclaimed from a wild state is prima facie evidence of title. *James v. Wood*, 8 L. R. A. 448, 82 Me. 173.

The presumption of law that property bought during marriage in the name of either spouse is community property attaches to

purchases in the name of the wife, although the act contained all necessary recitals that the funds with which the price was paid were paraphernal property. *Duruty v. Musacchia*, 42 La. Ann. 357.

In all cases of collisions between steamers and sailing vessels, the former are presumably in fault. *The J. D. Peters*, 42 Fed. Rep. 269.

A patent creates the presumption that the combination claimed therein is patentable and useful. *Mesker v. Thuener*, 42 Fed. Rep. 329.

Alterations or erasures in an instrument which appear upon their face to be suspicious require explanatory testimony before they are admissible in evidence; while, if no suspicion is raised from an inspection of the instrument, the alteration is presumed to have been made before execution. *Wilson v. Hotchkiss*, 81 Mich. 172.

Notice and proofs of loss mailed to an insurer will be presumed to have been duly received, in the absence of evidence to the contrary. *Pennypacker v. Capital Ins. Co.* 8 L. R. A. 236, 80 Iowa, 56.

A tenant in common of real estate in possession is presumed to be in under his own title and not in right of his co-tenant. *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541.

Long delay in presenting a claim against another may be sufficient, when taken in connection with other circumstances, to create a presumption of payment. *Long v. Straus*, 124 Ind. 84.

Every reasonable presumption will be indulged to sustain a marriage when the celebration of the marriage is once shown. *Cartwright v. McGown*, 10 West. Rep. 589, 121 Ill. 388.

In a prosecution for adultery, after defendant's marriage has been proved, its continuance is presumed until dissolution is shown. *People v. Stokes*, 71 Cal. 263.

Although the law presumes a person who has not been heard of for seven years to be dead, in the absence of special circumstances it draws no presumptions, from that fact, as to the particular period at which he died. *Evans v. Stewart*, 81 Va. 724; authorities cited in *Johnson v. Merithew*, 5 New Eng. Rep. 855, 80 Me. 111.

It is sufficient for the shipper to prove the reception of the goods by the carrier, and that they have not been delivered to the consignees, to place upon the carrier the burden of proving that

the loss was caused by a fortuitous event or irresistible force, or has arisen from a defect in the goods or thing itself. *Richelieu & O. Nav. Co. v. Fortier*, Montreal L. R. 5 Q. B. 224.

In the absence of proof to the contrary it will be presumed that a change in the grade of a street was made under the direction of the public authorities, especially after fifteen years of acquiescence and use as graded. *Jones v. Weitershausen*, 131 Pa. 62.

A sheriff's deed will be presumed, in the absence of any showing to the contrary, to have been made at the court house door in the proper county, and at an appropriate hour. *Kendrick v. Latham*, 25 Fla. 819.

An alteration apparent on the face of a writing raises no presumption that it was made after delivery and without authority, and the burden is not upon the party offering it in evidence to explain the alteration, but upon defendant to prove his allegations that the alterations were made after delivery and without authority. *Hagan v. Merchants & Bkrs. Ins. Co.* (Iowa) 46 N. W. Rep. 1114.

It is not essential that all the necessary facts to establish his cause of action should be shown by plaintiff's own evidence, but it is sufficient if they are shown by the evidence in the case, whether it be plaintiff's or defendant's. *Toponce v. Corinne Mill C. & S. Co.* (Utah) 24 Pac. Rep. 534.

In the absence of any allegation or proof on the subject courts of one State will presume that the laws of another State are the same as their own. *Thomas v. Pendleton* (S. Dak.) 46 N. W. Rep. 180.

The withdrawal of an answer is a confession of the cause of action stated in the petition and renders proof thereof unnecessary. *Graves v. Cameron*, 77 Tex. 273.

The confinement of a man in the insane asylum ten years before, which has been followed by at least eight years of successful practice as a physician, does not create a presumption that his insanity still continues. *Langdon v. People*, 133 Ill. 382.

An entry by an agent or clerk of a company on the company's books will be presumed to have been made by authority of the company in the absence of proof to the contrary. *Henry v. Travelers Ins. Co.* 42 Fed. Rep. 363.

The presumption that, when a connection between parties is illicit, it continues as it began, whether it is presumed of fact or of law, is rebuttable. *White v. White*, 7 L. R. A. 799, 82 Cal. 427.

The desertion of husband or wife without consent or reasonable cause is presumed to be willful and malicious. *Van Dyke v. Van Dyke*, 135 Pa. 459.

Mere proof does not raise a presumption of the proper execution of a sealed instrument. *Keedy v. Moats*, 72 Md. 325.

The court never presumes fraud. Carelessness in the dealings between husband and wife does not tend to establish fraud. *Schreyer v. Scott*, 134 U. S. 405, 33 L. ed. 955.

Parol evidence is admissible to show the true character of a mortgage and for what purpose and what consideration it was given, and that the mortgage, although absolute upon its face, was in fact given for future advancements. *Louisville Bkg. Co. v. Leonard* (Ky.) 11 Ky. L. Rep. 917.

Checks dated at a certain place and drawn upon the "First National Bank," will be presumed, in the absence of anything to the contrary, to have been drawn upon the First National Bank of such place, where it appears that such bank exists and no other bank or place appears on the check. *Culver v. Marks*, 7 L. R. A. 489, 122 Ind. 554.

The presumption of negligence on the part of a railroad company which prevails in case of an injury to its passenger does not obtain in case of injuries to the horse of a traveler upon a highway, which are received while the traveler is attempting to cross the railroad track. *Terre Haute & I. R. Co. v. Clem*, 7 L. R. A. 588, 123 Ind. 15.

The possession of a deed by the grantee is prima facie evidence of delivery where there is nothing to impeach the bona fides of his possession. *Strough v. Wilder*, 7 L. R. A. 555, 119 N. Y. 30.

It will be presumed that a check given by a garnishee to the plaintiff for the amount claimed in the garnishment proceedings was accepted in payment and was in fact paid. *Lehigh Valley R. Co. v. Beatty*, 134 Pa. 294.

A presumption of death because of absence and a failure to communicate with relatives does not arise where, because of illiteracy or other reason, it is improbable that there would have been any communication. *Re Miller's Estate* (Surr. Ct.) 30 N. Y. S. R. 212.

The legal presumption in favor of innocence does not extend to the alteration of negotiable instruments. *Hess's App.* 134 Pa. 31.

Since fraud is not presumed if no particular circumstances of

suspicion attach to an altered instrument, the alteration is presumed to be innocent or to have been made prior to its execution. *Rodriguez v. Hayes*, 76 Tex. 225.

Possession of a mine is presumed to be lawful in the absence of evidence to the contrary. *Gilpin v. Sierra Nevada Consol. Min. Co.* (Idaho) 23 Pac. Rep. 547.

When insolvency is relied upon to rebut the presumption of payment arising from lapse of time, the creditor must show that it existed during the entire statutory period next after the maturity of the debt. *Alston v. Hawkins*, 105 N. C. 3.

In the absence of any showing to the contrary it will be presumed that the common law prevails in a sister State. *State v. Clay*, 100 Mo. 571.

The presumption which applies to the last carrier, that the goods were delivered to it as they were started, applies to intermediate carriers. *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148.

The presumption that a child born in wedlock is legitimate, where the husband and wife had opportunities of access, is not conclusive, but may be overcome by clear proof of the contrary, which may consist of proof that the husband was incompetent to have sexual intercourse with his wife or she with him. *Goss v. Froman* (Ky.) 8 L. R. A. 102.

To rebut the presumption of death from absence for more than seven years, evidence that a witness had conversed with a man, who informed him that the person was alive in another State, where he had seen him a short time before, is admissible, although hearsay. *Dowd v. Watson*, 105 N. C. 476.

Where goods to be transported by several carriers are lost or injured and the last carrier is sued, it will be held liable if it does not show that the loss or injury occurred on some preceding line, on the presumption that the goods delivered to the first carrier were also delivered to the last and in the same condition in which they were started. *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148.

Liberal presumptions are indulged in favor of the regularity of homestead proceedings. A proper order to the surveyor will be presumed where the ordinary has approved the plat returned to him. *Timothy v. Chambers*, 85 Ga. 267.

The record of a probate court being silent on the point it will be presumed that the facts were before the court which author-



ized its exercise of jurisdiction in granting letters of administration, when the question is raised collaterally. *Mills v. Herndon*, 77 Tex. 89.

The holder of a draft will, in the absence of any evidence tending to show the contrary, be presumed to be a bona fide holder for value. *Hall v. Emporia First Nat. Bank*, 133 Ill. 234.

In the absence of all proof on the subject the presumption is that the law of Minnesota is the same as that of Wisconsin. *Osborn v. Blackburn* (Wis.) 10 L. R. A. 367.

The legal presumption is that a man acts honestly and without fraud. *Re Davis' Estate* (Mont.) 25 Pac. Rep. 105.

All dealings between an attorney and his client for the benefit of the former are presumptively invalid on the ground of constructive fraud; and such presumption can be overcome only by the clearest and most satisfactory evidence. *Thomas v. Turner* (Va.) 14 Va. L. J. 558.

Where it is doubtful from the evidence whether a contract entered into by a guardian was made before or after the passage of an Act rendering such contract valid, it will be presumed that the guardian, where his report has been filed and recorded by order of the court, has done his duty, and that the law was in force when he made the contract. *Wren v. Harris*, 78 Tex. 349.

An attorney who acts as such in a suit is presumed to have been employed. *Shain v. Forbes*, 82 Cal. 577.

After the execution of a power of attorney the one conferring is conclusively presumed to have known what it meant and the extent of the authority conferred. *Clark v. Hyatt*, 118 N. Y. 563.

The burden rests upon the guardian to show affirmatively that he exercised the required degree of care in taking the securities which he turned over to his ward on accounting, or that they are good beyond peradventure and will be collectible upon their maturity. *Line v. Lawder*, 122 Ind. 548.

Malice in instituting a prosecution may be inferred from the want of probable cause; but the want of probable cause cannot be inferred from any degree of even expressed malice. *Leysor v. Field* (N. M.) 23 Pac. Rep. 173.

The giving of a promissory note is evidence of an accounting and settlement of all demands between the parties, and that the maker was indebted to the payee upon such settlement to the amount of the note; but this presumption may be explained or

repelled by proof of the consideration of the note and of the surrounding circumstances. *Davis v. Gallagher*, 55 Hun, 593.

Where a note is given a consideration is presumed and the holder is not required to show it. *Mandel v. Fulcher* (Ga.) 12 S. E. Rep. 469.

A dedication of land to public use is not presumed but must appear by acts and declarations of the owner, of such a public and deliberate character as clearly to show an intention on his part to surrender his land for the use of the public; and the burden of proof is on the party asserting such dedication. *Hogue v. Albina* (Or.) 10 L. R. A. 673, 32 Am. & Eng. Corp. Cas. 49.

Malice is implied in the utterance of slanderous words and it is not necessary to prove it *aliunde*. *Brueshaber v. Hertling*, 78 Wis. 498.

No inference of negligence on the part of a street railway company arises from the mere fact of a collision between one of its cars and a wagon. *North Side St. R. Co. v. Want* (Tex.) 15 S. W. Rep. 40.

There is no presumption of survivorship or priority of death by reason of age or sex, where father, mother and children all perish in a flood which destroys their dwelling; nor is it presumed that they all died at the same moment. *Cowman v. Rogers* (Md.) 10 L. R. A. 550.

The presumption of the legitimacy of a child if the husband has opportunity of access is not conclusive where he and his wife are living separate. *Woodward v. Blue* (N. C.) 10 L. R. A. 662.

## CHAPTER IV.

### PRIMA FACIE EVIDENCE.

§ 60. *Starkie's Definition.*

61. *As Defined by the United States Supreme Court.*

62. *Implications of the Topic with the Burden of Proof.*

63. *Best's Definition.*

§ 60. **Starkie's Definition.**—Prima facie evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be accredited by the jury, unless it be rebutted, or the contrary proved. Conclusive evidence, on the other hand, is that which excludes, or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. 1 Starkie, Ev. 479.

§ 61. **As Defined by the United States Supreme Court.**—Prima facie evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact, and remains sufficient for that purpose if not rebutted. The jury are bound to consider it in that light, and the court will set aside their verdict and grant a new trial if without any rebutting evidence they disregard it. In a legal sense, such prima facie evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive; that is, it should operate in the minds of the jury as decisive to found their verdict as to the fact. *Crane v. Morris*, 31 U. S. 6 Pet. 598, 8 L. ed. 514; *United States v. Wiggins*, 39 U. S. 14 Pet. 334, 10 L. ed. 481.

§ 62. **Implications of the Topic with the Burden of Proof.**—*Mr. Justice Story's* definition is scarcely less logical and satisfactory. He says: "It is such that in judgment of law is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict, and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregarded it. It would be

error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on the subject." *Kelly v. Jackson*, 31 U. S. 6 Pet. 622, 8 L. ed. 523.

A consideration of this topic becomes necessary when the principles that characterize the affirmative of the issue are recalled. A party litigant, upon whom is cast the *onus probandi*, in order to comply with certain well-recognized principles of law, introduces in support of the averment of his declaration certain evidence. Thus, in an action to determine the liability on a promissory note, the plaintiff usually declares and incorporates in affirmation of his claim statements to the effect that the defendant made, executed and delivered the note in suit; that the complainant became, in the due course of business, the holder and owner thereof for value, before maturity; that the same is due and unpaid; and that payment has been demanded and refused. This constitutes a *prima facie* case, on producing the note, which is usually then offered in evidence, and the plaintiff rests. The burden of proof is then shifted.

This mercurial nature of the burden of proof will be hereafter noted (Chap. V.), and many illustrations of the peculiar province *prima facie* evidence sustains in the actual trial of a case are afforded by a close examination of that topic. It would involve a technical inaccuracy, perhaps, but would thoroughly accord with the actual facts, as seen and developed in our trial court, were I to postulate for *prima facie* evidence this characteristic, viz.: "Whenever the burden of proof devolves upon any party than the one originally holding the affirmative, then and in that event, *prima facie* evidence has been established, and if no other evidence were offered, such party would be entitled to judgment."

§ 63. **Best's Definition.**—Mr. Best is singularly infelicitous in his attempt at a definition. He says: "Strong presumptions of fact shift the burden of proof, even though the evidence to rebut them involved the proof of a negative. The evidentiary fact giving rise to such a presumption is said to be '*prima facie* evidence' of the principal fact of which it is evidentiary. Thus,

possession is prima facie evidence of property; and the recent possession of stolen goods is sufficient to call upon the accused to show how he came by them, and in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them. So, a receipt for rent accrued, due subsequently to that sued for, is prima facie evidence that all rent had been paid up to the time of giving the receipt, as it is not likely that a landlord would not call in first the debt of longest standing." Best, Ev. § 321, citing Gilbert, Ev. (4th ed.) 157.

## CHAPTER V.

### THE BURDEN OF PROOF.

- § 64. *The Ulterior Aim of Litigation.*
- 65. *Burden of Proof Usually with the Plaintiff.*
- 66. *Degree of Proof Necessary.*
- 67. *An Unfailing Test—Burden on the Affirmative.*
- 68. *General Acceptation of This Rule.*
- 69. *Early Recognized by English Courts.*
- 70. *The Rule in State and Federal Courts Considered.*
- 71. *Effective Presentation of This Subject.*
- 72. *Other Authorities.*
- 73. *Rule where Both Parties Hold the Affirmative.*
- 74. *Rule where Presumption Stands for Proof.*
- 75. *Shifting Nature of the Burden of Proof.*
- 76. *Mercurial Character of the Rule.*
- 77. *When Facts are Peculiarly within the Knowledge of a Party.*
- 78. *Harmony of the Authorities.*
- 79. *Burden of Proof in Malicious Prosecution.*
- 80. *In Cases of Payment.*
- 81. *In Cases of Undue Influence.*
- 82. *Proof of a Negative not Required; Exceptions to This Rule.*
  - a. *Views of Mr. Justice Miller.*
  - b. *Affirmative Evidence Entitled to the Greatest Weight.*
- 83. *Burden of Proof in Cases of Contributory Negligence.*
  - a. *The Weight of Authority.*
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- 84. *The Rule as to Negotiable Paper.*
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  - c. *Where Instrument is Payable to Bearer.*
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- 85. *Burden of Proof in Matrimonial Actions.*
- 86. *The Scintilla Doctrine Considered.*
- 87. *Opening the Case; Rights of the Parties.*
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- f. *Object of the Opening; What may be Stated.*
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- h. *Undue License in Opening a Case or in Addressing the Jury.*
- i. *Free Latitude Allowed.*
- j. *A Recent Case Considered.*
- k. *Instance of Improper Opening.*
- l. *Further Illustrations of Impropriety; Reprimand by the Court.*
- 88. *Personal Abuse.*
  - a. *Extreme Cases Cited.*
  - b. *Restraining Use of Degrading Language.*
- 89. *In Criminal Cases the Rule is That the Burden of Proof never Shifts.*
  - a. *Distinction between Civil and Criminal Cases as Regards Quantum of Evidence.*
  - b. *Plaintiff "Rests" after Proving a Prima Facie Case.*
- 90. *Party Having Affirmative should Open and Close Case; This Rule Practically without Exception.*
- 91. *Proof of Negative Pregnant.*
- 92. *Citation of Recent Authority in Support of the Foregoing Rules.*

§ 64. **The Ulterior Aim of Litigation.**—All litigation has for its ulterior aim the ascertainment of facts and the application to those facts of some well-recognized legal principle. The party plaintiff appears in court with the rehearsal of a grievance. Through the media of appropriate pleadings, he presents to the attention of the trial court his cause of action, in which certain averments must be sustained, or the cause of action results in a nonsuit. Obviously, under such circumstances, the law very appropriately casts upon the party asserting the affirmative of an issue, the burden of proving it. *Simonton v. Winter*, 30 U. S. 5 Pet. 141, 8 L. ed. 75.

§ 65. **Burden of Proof Usually with the Plaintiff.**—The correlative of this proposition is, that upon the party who denies a material averment of the complaint, no evidence in support of his denial is required, until his adversary has at least laid some probable ground for belief in the allegations of his petition or complaint. In the vast majority of instances this burden of proof (*onus probandi*) is with the plaintiff. The exceptions to this general rule

will be considered hereafter. For the purposes of this paragraph we will assume plaintiff has the affirmative of the issue, and with that assumption, it becomes necessary for him, before he can rest his case, to establish the truth of his averment, by competent evidence sufficient for that purpose.

§ 66. **Degree of Proof Necessary.**—Controversy has surged around the proposition, whether this evidence must be of so positive and convincing a character as to be entirely free from reasonable doubt, and the anarchy pervading this entire subject is best evidenced by the hopeless confusion and contradiction found in the earliest decisions. The progressive nature of the law of evidence is graphically shown by historical résumé of these decisions, and the American courts have availed themselves of all the learning and speculation on the subject, yet without entire unanimity as to the result. Without disclosing the departures from the general rule, we may affirm that a party, upon whom rests the burden of proof as to an issue joined in a civil action, is not bound to establish it beyond a reasonable doubt; it is sufficient if his evidence preponderates, although not free from doubt; all that is required from him at the beginning is to give competent evidence sufficient, if undisputed, to establish the truth of his averments. *Stearns v. Field*, 90 N. Y. 640.

§ 67. **An Unfailing Test—Burden on the Affirmative.**—An unfailing test adopted by the court for ascertaining upon which side the affirmative of an issue really lies, is to consider which party would be successful if no evidence at all were given, or, what is substantially the same thing, to examine whether, if the particular allegation to be proved were struck out of the answer, or the pleading, there would or would not be a defense to the action, or an answer to the previous pleading. 1 Wait, Law and Pr. (5th ed.) 465.

§ 68. **General Acceptation of This Rule.**—This proposition has long passed from the sphere of legitimate debate or serious question and is among the indisputable assertions of evidentiary law; it is sustained by a series of well considered decisions in which the doctrine is sustained with such vigor as to leave it a matter of serious doubt if the position can ever be successfully assailed. Among the authorities referred to are: *Wright v. Wright*, 139 Mass. 177; *Dorr v. Fisher*, 1 Cush. 272; *Morgan v. Morse*, 13 Gray, 150; *Broaders v. Toomey*, 9 Allen, 65; *St. John v. Eastern*



*R. Co.* 1 Allen, 544; *Beals v. Merriam*, 11 Met. 470; *Gilmore v. Wilbur*, 18 Pick. 517; *Kendall v. Brownson*, 47 N. H. 186; *Dillingham v. Roberts*, 77 Me. 284; *Wood v. Knapp*, 1 Cent. Rep. 170, 100 N. Y. 109; *The Argo*, 1 Gall. 150; *United States v. Hayward*, 2 Gall. 499; *Luckhart v. Ogden*, 30 Cal. 547. This rule applies to claimants in forfeiture cases. *Cox v. Cox*, 59 Tex. 521; *Kelsey v. Frazier*, 78 Mo. 111; *Fox v. Hilliard*, 35 Miss. 160; *Friedlander v. Brooks*, 35 La. Ann. 741; *Craig v. Pervis*, 14 Rich. Eq. 150; *Brandon v. Cabiness*, 10 Ala. 155; *Johnson v. Gorman*, 30 Ga. 612; *Shulman v. Brantley*, 50 Ala. 81; *Louisville & N. R. Co. v. Brown*, 13 Bush, 475; *Karst v. St. Paul, S. & T. F. R. Co.* 23 Minn. 401; *Smith v. Smith*, 60 Wis. 329; *West v. St. John*, 63 Iowa, 287; *Smith's App.* 52 Mich. 415; *Hyde v. Heath*, 75 Ill. 381; *Davidson v. Nicholson*, 59 Ind. 411; *Priest v. Whitacre*, 78 Va. 151; *Briceland v. Com.* 74 Pa. 463; *Randolph v. Wilson*, 38 N. J. Eq. 28, 287; *Heinemann v. Heard*, 62 N. Y. 448; *First Nat. Bank v. Haight*, 55 Ill. 191; *Martin v. Brewster*, 49 Ill. 306; *Bennett v. O'Brien*, 37 Ill. 250. It is evident from the most cursory examination of these authorities that the principle referred to is absolutely controlling.

§ 69. **Early Recognized by English Courts.**—The foregoing propositions, having been well established, were early recognized by the English courts, and the principle contended for in the text has assumed a statutory form in Stephen's Digest, which we append in full:

“Art. 93. *He Who Affirms must Prove.*

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.

“Art. 94. *Presumption of Innocence.*

“If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.

“The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

“Art. 95. *On Whom the General Burden of Proof Lies.*

“The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given, if no evidence at all were produced on either side, regard being had to

any presumption which may appear upon the pleadings. As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first, by his proving facts which raise a presumption in his favor.

“Art. 96. *Burden of Proof as to Particular Fact.*”

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

“Art. 97. *Burden of Proving Fact to be Proved to Make Evidence Admissible.*”

“The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

I will add Wharton's statement that among the most authoritative exponents of this view is Best, in his treatise on Evidence. “The general rule,” he declares, “is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute,—according to the maxim, *Ei incumbit probatio qui dicit, non qui negat*,” and to this effect he cites Starkie and Phillips, sustaining his views by a copious exposition. See Best, Ev. (5th ed.) 369.

“It is seldom that the law requires a party to prove a negative, which is always difficult, and often impossible. On the contrary, affirmative acts are susceptible of ready proof, and attended with no hazard of a failure of justice; as where the creditor affirms that his debt was incurred for the purchase money or improvement of the homestead, no reason is perceived why he should not be required to establish that fact.” *Stevenson v. Marony*, 29 Ill. 532, Walker, J.

§ 70. **The Rule in State and Federal Courts Considered.—**

“Burden of proof” is properly applied to a party affirming some fact essential to the support of his case. In this sense it never shifts from side to side during the trial. Loosely used, it is confounded with the “weight of evidence,” which often shifts as facts

and presumptions appear and are overcome. *Pease v. Cole*, 53 Conn. 71, Loomis, *J.*

The principle is that he who affirms the existence of a given state of facts must prove it—a rule adopted because the negative does not admit of the direct and simple proof of which the affirmative is capable. *Stevenson v. Marony*, 29 Ill. 532; *McClure v. Pursell*, 6 Ind. 330.

§ 71. **Effective Presentation of This Subject.**—"The burden of proof and weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial according to the nature and strength of the proofs offered in support or denial of the main fact to be established. *Central Bridge Corp. v. Butler*, 2 Gray, 132. It may be added that in criminal cases the *onus probandi* is upon the prosecution throughout; a *prima facie* case when once established by the State would in the absence of rebutting testimony satisfy the jury. *Com. v. McKie*, 1 Gray, 61. The opinion of *Mr. Justice Bigelow* is a singularly effective presentation of this subject.

The burden of proof resting on a plaintiff is co-extensive only with the legal proposition upon which his case rests. It applies to every fact which is essential to or necessarily involved in that proposition; not to facts relied on in defense to establish an independent proposition, however inconsistent with that upon which the plaintiff's case depends. It is for the defendant to furnish the proof of such facts; and, when he has done so, the burden is upon the plaintiff, not to disprove these particular facts, nor the propositions which they tend to establish, but to maintain the propositions upon which his own case rests, notwithstanding such controlling testimony, and upon the whole evidence in the case. The distinction may be narrow, but it is real, and often decisive. *Wilder v. Cowles*, 100 Mass. 490, Wells, *J.*; *Willett v. Rich*, 2 New Eng. Rep. 672, 142 Mass. 357.

"By the *onus probandi*, I understand, is meant the obligations imposed upon a party who alleges the existence of a fact or thing, necessary in the prosecution or defense of an action, to establish it by proof. It may be proved by the production of evidence in the usual way; or the law, under certain circumstances in certain cases, may presume its existence without proof.

But it is nevertheless a part of the case of the party who alleges its existence, and must be made out beyond any reasonable doubt. Whenever it may be presumed to exist, in the absence of proof, the presumption may be repelled and overcome by evidence; and whenever the repelling proof leaves the fact to be established in doubt and uncertainty, the party making the allegation is to suffer, and not his adversary." Brown, J., in *People v. McCann*, 16 N. Y. 58.

§ 72. **Other Authorities.**—As a familiar illustration of the *onus probandi*, we may cite those instances where the litigant seeks to recover damages for negligence or failure in the transmission or delivery of telegraphic communication. It is well settled by authority, that in such cases the *onus probandi* is with the plaintiff, and he must show, under properly pleaded averments, not merely the fact of failure to transmit or deliver, but also gross negligence or willful misconduct on the part of the defendant, so as to give him a cause of action for more than nominal damages. *Western U. Teleg. Co. v. Buchanan*, 35 Ind. 429; *Baldwin v. United States Teleg. Co.* 45 N. Y. 752; *United States Teleg. Co. v. Gildersleve*, 29 Md. 243; *White v. Western U. Teleg. Co.* 14 Fed. Rep. 710; *Hart v. Western U. Teleg. Co.* 66 Cal. 579; *Camp v. Western U. Teleg. Co.* 1 Met. (Ky.) 164. All messages are taken with reference to printed terms, unless otherwise provided by special contract (*United States Teleg. Co. v. Gildersleve*, 29 Md. 247; *United States Teleg. Co. v. Buchanan*, 35 Ind. 435; *Lyon v. Culbertson*, 83 Ill. 33; *Breese v. United States Teleg. Co.* 48 N. Y. 139, 142); and that a telegraph company has the right to exact such terms or stipulations from its customers is the settled law in most of the States in the Union and in England. *M'Andrew v. Electric Teleg. Co.* 33 Eng. L. & Eq. 180; *Western U. Teleg. Co. v. Carew*, 15 Mich. 525; *Ellis v. American Teleg. Co.* 13 Allen, 226; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299; *Clement v. Western U. Teleg. Co.* 137 Mass. 463; *Schwartz v. Atlantic & P. Teleg. Co.* 18 Hun, 157; *Breese v. United States Teleg. Co.* 48 N. Y. 132; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Young v. Western U. Teleg. Co.* 65 N. Y. 163.

The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them;

that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulations printed in the blanks have frequently been under consideration in the courts, and have always, in New York, and generally elsewhere, been upheld as reasonable. *Kiley v. Western U. Teleg. Co.* 11 Cent. Rep. 895, 109 N. Y. 231.

**§ 73. Rule where Both Parties Hold the Affirmative.**—There are cases in which both parties hold the affirmative as to the issues to be tried, as, where the plaintiff sues for the recovery of money lent, and the defendant interposes a general denial, and also a claim for a set-off. In such a case the plaintiff would be bound to prove his case, and if he does so, and then rests his case, the defendant will then be required to establish his set-off by evidence, or it will not be allowed.

**§ 74. Rule where Presumption Stands for Proof.**—In determining who is bound to introduce evidence to sustain his side of the case, it is important to recollect that there are cases in which some legal presumption stands for proof until it is rebutted; and that although the issue may in form cast the affirmative on a party, yet this legal presumption is still sufficient proof, until the presumption is rebutted by evidence on the other side. 3 Wait, Law and Pr. (5th ed.) 466.

**§ 75. Shifting Nature of the Burden of Proof.**—In the examination of contested questions of fact, the burden of proof may, in the course of the trial, be thrown from one party to the other several times as the complexion of the proof may change; and the test is to consider which party would be successful if no more evidence were given.

The expression that the burden of proof is shifted by the presentation of a *prima facie* case only means that there is a necessity to answer it, or it will prevail. The burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial. *Heinemann v. Heard*, 62 N. Y. 448.

**§ 76. Mercurial Character of the Rule.**—The mercurial

character of this rule of evidence, by which the burden of proof is shifted from the party plaintiff to the party defendant, and *vice versa*, is abundantly illustrated in the trial of any complicated case; frequently but slight proof of the affirmative of the issue is necessary to throw the burden of proving the negative upon the defendant. There are exceptions to the general rule that he who takes the affirmative of the issue takes the burden of proof, as where the declaration or plea sets up negative matter, essential to the issue, which is peculiarly within the knowledge of the other party. In such cases the allegations are taken as true unless denied by the other party. As illustrative of the positions contended for, let us cite a hypothetical case of the law of bailments: A warehouseman endeavors to account for his failure to deliver certain goods intrusted to his care, by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proven with reasonable certainty. Nor do we concur in the view that there is in these cases any real "shifting" of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff suing him for the loss of goods must in all cases allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts, unexplained, are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman. *Claylin v. Meyer*, 75 N. Y. 260.

This shifting tendency as regards the burden of proof is largely regulated by the presence or absence of those presumptions of law which are rebuttable, by presumptions of facts, and by every species of evidence strong enough to establish a *prima facie* case against a party. When a presumption is in favor of a party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of a party who asserts the affirmative that its effects become visible, as the opposite side is then bound to prove his negative. Best, Ev. § 273.

§ 77. **When Facts are Peculiarly within the Knowledge of a Party**—Here we encounter an exception to the general rules regulating the burden of proof. The law will not force a man to show a thing, which by intendment of law is not within his knowledge. The least reflection will disclose the fact that frequently the litigant parties are in entirely dissimilar relations, as regards the apprehension of material facts, and in locating the status and presence of the burden of proof, which, in obedience to its mercurial propensities, is constantly shifting from side to side, the presence or absence of personal knowledge of a controverted point must be ascertained by constant appeal to the probabilities.

In *Rex v. Turner*, 5 Maule & S. 206, Bayley, *J.*, says: "I have always understood it to be a general rule, that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." But on this dictum being quoted, Alderson, *B.*, doubted whether these expressions as a general rule are not too strong. They are right as to the weight of evidence, but there should be some evidence to start it, in order to cast the *onus* on the other side. And in *Rex v. Burdette*, 4 Barn. & Ald. 140, Holroyd, *J.*, states in the most explicit terms that the rule in question is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant, of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted or not weakened by contrary evidence which it would be in the defendant's power to produce if the fact directly or presumptively proved were not true. These views of the English courts are abundantly sustained by the weight of authorities in this country.

The vacillating character of what in legal parlance is known as the burden of proof has been sufficiently demonstrated by the authorities cited in the foregoing text. Now it may be illogical to characterize the burden of proof as "shifting." In strict precision, this is not so. It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence, which, uncontradicted, proves the fact alleged by him. It has, in such cases, frequently been said, that the burden of proof was

changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this; and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases, the party holding the affirmative is still bound to satisfy the jury affirmatively of the truth of the fact alleged by him, or he is not entitled to a verdict. *Lamb v. Camden & A. R. & T. Co.* 46 N. Y. 271, approved by *Ch. J. Church* in *Heinemann v. Heard*, 62 N. Y. 448; *Wilder v. Cowles*, 100 Mass. 487; *Southworth v. Hoag*, 42 Ill. 446; *Pusey v. Wright*, 31 Pa. 387; *Oaks v. Harrison*, 24 Iowa, 179; *Seavy v. Dearborn*, 19 N. H. 351.

§ 78. **Harmony of the Authorities.**—Recent authorities are in entire harmony with the sentiment of the text, and the matter is practically beyond the reach of controversy or suspicion. Burden of proof ordinarily is cast upon the party who substantially asserts the burden of the issue (*Note to Oldham v. Kerchner* (N. C.) 28 Am. Rep. 308, 309; *Elkinton v. Brick*, 1 L. R. A. 161, 44 N. J. Eq. 154; *Bullock v. Rouse*, 81 Cal. 591; *Sedgwick v. Taylor*, 84 Va. 820; *Brown v. Scott*, 87 Ala. 453); or, as the rule has been otherwise stated, the burden of proof in the whole action lies upon the party who would be defeated if no evidence were given on either side. *Royal Ins. Co. v. Schwing*, 57 Ky. 410.

It always becomes immaterial upon whom the burden of proof rests, when all the evidence concerning the transaction inquired into is introduced. *McCormick v. Holmes*, 41 Kan. 265.

The party upon whom is cast the burden of proof is always entitled to the concluding argument. *Lieb v. Craddock*, 57 Ky. 526; *Olds Wagon Co. v. Benedict*, 25 Neb. 372.

In condemnation proceedings, the burden of proof is on the defendant to show damages, and he has the opening and closing arguments. *Colorado Cent. R. Co. v. Allen*, 13 Colo. 229.

§ 79. **Burden of Proof in Malicious Prosecution.**—If want of probable cause be shown in malicious prosecution, the plaintiff must produce competent evidence showing actual malice. *Brown v. Willoughby*, 5 Colo. 1. The order of evidence is discretionary with the courts. *Smith v. Mayer*, 3 Colo. 207.

§ 80. **In Cases of Payment.**—Defendant admitting plaintiff's claim for wages has the burden of proof as to payment. *Love-lock v. Gregg*, 14 Colo. 53.



§ 81. **In Cases of Undue Influence.**—The burden of proof may sometimes shift. Thus, where it is shown that undue influence existed in obtaining the execution of a will, and the mind of one was reduced to a state of vassalage to the mind of another, and a gift was made by the former to the latter, then the burden of proof will be shifted. The gift will be presumed to be void, and the burden of upholding its fairness will rest upon the recipient of the gift. *Gay v. Gillilan*, 10 West. Rep. 303, 92 Mo. 250. But in *Starratt v. Mullen*, 2 L. R. A. 697, 148 Mass. 570, where an action was brought for goods sold and delivered and for money loaned, and the defense was set up that the goods were delivered and the money given as orally agreed by the plaintiff for the use of money already supplied him by defendant, it was held that the burden of proof did not shift, but remained upon plaintiff all the while to prove that the goods were sold and the money loaned. See also *Foster v. Reid*, 78 Iowa, 205, 16 Am. St. Rep. 437.

§ 82. **Proof of a Negative not Required; Exceptions to This Rule.**—It is a general rule that a party cannot be required to prove a negative, but this rule is not without exception. Thus, where an action is brought to recover damages for personal injuries, arising from the alleged negligence of another, it is the duty of the plaintiff to prove, not only that the injury was caused by the defendant's negligence, but also that he, the plaintiff, did not contribute to the injury by any negligence on his own part. This proof, in some form, constitutes a part of the plaintiff's case, and there is no presumption of negligence against either party. Circumstances may show, without further evidence, that there was no contributing negligence on the part of the injured party; but, in the absence of such circumstances, there must be direct evidence of the fact. *Warner v. New York Cent. R. Co.* 44 N. Y. 465; *Button v. Hudson River R. Co.* 18 N. Y. 248; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236; *Parrott v. Knickerbocker Ice Co.* 2 Sweeny, 93; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534. See *Murphy v. Deane*, 101 Mass. 455.

a. **Views of Mr. Justice Miller.**—*Mr. Justice Miller* of the United States Supreme Court has given the most perfect exposition of the principles that dominate and control this refinement of the logicians, and in *Stitt v. Huidekoper*, 84 U. S. 17 Wall. 385, 21 L. ed. 644, he employs the following language: "The court charged the jury that it is a rule of presumptions that ordinarily a witness

who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed. We are of opinion that the charge was a sound exposition of a recognized rule of evidence, of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here."

The New York Court of Appeals adds the weight of its authority in affirmance of the same proposition, and *Judge Allen*, in a comparatively recent case, where the question of negligence was an important factor in an action for damages occasioned by a railway accident, says: "As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere 'I did not hear' is entitled to no weight, in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact." *Culhane v. New York C. & H. R. R. Co.* 60 N. Y. 133.

It will be seen from the cases that no general and universal rule can be laid down, respecting the comparative value of positive and negative testimony. *Denham v. Holeman*, 26 Ga. 182. But when positive testimony on the one side is met by belief or impression on the other, and there are no means of determining the truth, other than by testimony itself, there is in fact no conflict of evidence, and a finding which rejects the positive testimony and adopts the mere impression is not only not conclusive, but is against evidence. *Dresser v. Van Pelt*, 1 Hilt. 316. But it must be remembered that circumstances may outweigh direct evidence. *Bowie v. Maddox*, 29 Ga. 285. An inherent improbability in a statement may deny all its claims to belief. *Blankman v. Vallejo*, 15 Cal. 638; *Stilwell v. Carpenter*, 2 Abb. N. C. 238.

#### **b. Affirmative Evidence Entitled to the Greatest Weight.**

—When the evidence in a case is of both an affirmative and negative character, the affirmative evidence is entitled to the greater

weight. *Frantz v. Lenhart*, 56 Pa. 365; *Pool v. Devers*, 30 Ala. 672; *McKeever v. New York Cent. & H. R. R. Co.* 88 N. Y. 667; *Culhane v. New York Cent. & H. R. R. Co.* 60 N. Y. 133. But it is not true as a matter of law that negative evidence may not be sufficient, in fact, to counterbalance the positive testimony of a single witness. *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381. Where there is no conflict, negative testimony may have all the force of positive evidence. *Renwick v. New York Cent. R. Co.* 36 N. Y. 132. An issue of fact may be proved by either affirmative or negative evidence. *Duffield v. Delancey*, 36 Ill. 258.

### § 83. Burden of Proof in Cases of Contributory Negligence.

a. **The Weight of Authority.**—There is a conflict among the decisions as to the party upon whom the burden of proving the plaintiff's contributory negligence rests. The weight of authority seems to favor the doctrine, that the plaintiff must show that he used due care and caution, and that his own negligence did not contribute to cause the injury, and that a plaintiff suing for the death of a person killed through the negligence of the defendant must show due care and want of contributory negligence on the part of the deceased. The use of due care may be proved by circumstantial or direct evidence. The plaintiff is not required to prove due care by direct affirmative evidence; the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, in the circumstances under which the injury was received. On the other hand, by well-considered authorities, it has been held that the want of due care or the contributory negligence on the part of the plaintiff is a matter of defense, and that the burden of establishing it is on the defendant. This is certainly the more reasonable rule, and it is the one adopted by Wharton, Shearman and Redfield, and Deering (§ 406). *Branan v. May*, 17 Ga. 136; *Central R. Co. v. Moore*, 61 Ga. 151; *Dyer v. Talcott*, 16 Ill. 300; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 558; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425; *Benton v. Central R. Co.* 42 Iowa, 192; *Murphy v. Chicago, R. I. & P. R. Co.* 45 Iowa, 661.

b. **When Governed by the Pleadings.**—Where an answer admits the making and delivering of a promissory note and sets up an affirmative defense, the affirmative is with the defendant, who is entitled to open and close the case, and the refusal of the court

to allow him so to do is error, for which judgment will be reversed and a new trial ordered. *Lindsley v. European Petroleum Co.* 41 How. Pr. 56.

§ 84. **The Rule as to Negotiable Paper.**—The burden of proof as to the bona fide ownership of negotiable paper is an important topic, meriting careful scrutiny. Mr. Tiedeman, in a late treatise on Commercial Paper, at sec. 303, introduces the following language: "The possession of the paper by an indorsee or by an assignee, where the paper is payable to the bearer or indorsed in blank, is universally held to be prima facie proof of bona fide ownership, and the burden of proving the contrary is thrown upon the defendant in the action." *Marion County Comrs. v. Clark*, 94 U. S. 285, 24 L. ed. 62; *Collins v. Gilbert*, 94 U. S. 753, 24 L. ed. 170; *Brown v. Spofford*, 95 U. S. 478, 24 L. ed. 508; *Faulkner v. Ware*, 34 Ga. 498 (case of bill payable to bearer); *Vallett v. Parker*, 6 Wend. 615; *Horton v. Bayne*, 52 Mo. 531; *Johnson v. McMurry*, 72 Mo. 282; *Holme v. Karsper*, 5 Binn. 469; *Hall v. Allen*, 37 Ind. 541; *Jackson v. Love*, 82 N. C. 405; *Merchants & P. Nat. Bank v. Masonic Hall Trustees*, 62 Ga. 271; *Blum v. Loggins*, 53 Tex. 136; *Davis v. Bartlett*, 12 Ohio St. 544; *McCann v. Lewis*, 9 Cal. 246; *Palmer v. Nassau Bank*, 78 Ill. 380; *Lehman v. Tallassee Mfg. Co.* 64 Ala. 593.

a. **An Exception as to Unindorsed Paper.**—The possession of an instrument, payable to order, unindorsed by the payee or the last indorsee, is not prima facie proof of bona fide ownership (*Dorn v. Parsons*, 56 Mo. 601; *Gibson v. Miller*, 29 Mich. 355), unless it be in the possession of the personal representatives of a deceased payee or indorsee (*Scoville v. Landon*, 50 N. Y. 636). See, as to possession of the heir, *King v. Gottschalk*, 21 Iowa, 512; nor is it prima facie proof of bona fide ownership for a prior indorser to have possession. He must show good title. *Palmer v. Whitney*, 21 Ind. 61; *Mauldin v. Branch Bank*, 2 Ala. 502. See also *Oberle v. Schmidt*, 86 Pa. 221.

b. **A Further Exception where Paper was Executed without Consideration.**—It has also been held not to shift the burden to the holder, if it be proven that the paper was executed without consideration between the original parties, at least in the instances where the instrument is made payable to bearer, and is held by an indorsee. *Marion County Comrs. v. Clark*, 94 U. S. 285, 24 L. ed. 62; *Collins v. Gilbert*, 94 U. S. 757, 24 L. ed. 170; *Mechan-*

*ies & T. Bank v. Crow*, 60 N. Y. 85; *Grocers Bank v. Penfield*, 7 Hun, 279; *Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 458; *Bank of Pittsburgh v. Neal*, 63 U. S. 22 How. 96, 16 L. ed. 323; *Murray v. Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857; *Baxter v. Ellis*, 57 Me. 180; *Cummings v. Thompson*, 18 Minn. 252; *Fletcher v. Gushee*, 32 Me. 587; *Kellogg v. Curtis*, 69 Me. 212; *Magee v. Badger*, 34 N. Y. 247; *Belmont Branch Bank v. Hoge*, 35 N. Y. 65; *Cropsey v. Averill*, 8 Neb. 137; *Western Cottage Organ Co. v. Boyle*, 10 Neb. 409; *Harger v. Worrall*, 69 N. Y. 370; *Duerson v. Alsop*, 27 Gratt. 248; *Wilson v. Lazier*, 11 Gratt. 478; *Ellicott v. Martin*, 6 Md. 509; *Knight v. Pugh*, 4 Watts & S. 445; *Sloan v. Union Bkg. Co.* 67 Pa. 470; *Matthews v. Poythress*, 4 Ga. 287; *Mills v. Barber*, 1 Mees. & W. 425; *Low v. Chifney*, 1 Bing. N. C. 267; *Smith v. Braine*, 16 Q. B. 244; *Cook v. Helms*, 5 Wis. 107; *Greeneaux v. Wheeler*, 6 Tex. 515; *Holeman v. Hobson*, 8 Humph. 127; *Davis v. Bartlett*, 12 Ohio St. 537. See, *contra*, *Wetumpka v. Wetumpka Wharf Co.* 63 Ala. 611.

**c. Where Instrument is Payable to Bearer.**—It has been held that if the instrument is payable to bearer there is nothing on the face of the instrument to indicate that it has been transferred, and hence proof of want of consideration will throw upon the holder the burden of proving that he is a bona fide holder. *Bissell v. Morgan*, 11 Cush. 198. It would seem to be almost impossible for the maker to show want of consideration, without pointing out the additional fact that the instrument was delivered to someone other than the present holder. Furthermore the reason assigned for the justification of this exception is as applicable when there is as when there is not consideration between the original parties, and has no more weight in the one case than in the other.

**d. The Rule in Cases of Fraud.**—When fraud or illegality is proven to taint the original transaction, the difficulty of proving that the holder has knowledge of the same, and the usual rapidity of transfer of such instruments, for the purpose of realizing something out of the transaction, would seem to justify the shifting of the burden of proof, and the requirement that the holder should show affirmatively that he is a bona fide holder. *Smith v. Sac County*, 78 U. S. 11 Wall. 139, 20 L. ed. 102; *Marion County Comrs. v. Clark*, 94 U. S. 285, 24 L. ed. 62; *Collins v. Gilbert*, 94 U. S. 761, 24 L. ed. 173; *Perrin v. Noyes*,

39 Me. 384; *Cottle v. Cleaves*, 70 Me. 256; *Kellogg v. Curtis*, 69 Me. 212; *Roberts v. Lane*, 64 Me. 108; *Fitch v. Jones*, 32 Eng. L. & Eq. 134; *Smith v. Braine*, 3 Eng. L. & Eq. 380, 16 Q. B. 244; *Conley v. Winsor*, 41 Mich. 253; *Sperry v. Spaulding*, 45 Cal. 544; *Redington v. Woods*, 45 Cal. 406; *Devlin v. Clark*, 31 Mo. 22; *Horton v. Bayne*, 52 Mo. 531; *Johnson v. McMurry*, 72 Mo. 282; *Fuller v. Hutchings*, 10 Cal. 526; *McClintick v. Cummins*, 2 McLean, 98; *Vathir v. Zane*, 6 Gratt. 246; *Hutchinson v. Boggs*, 28 Pa. 294; *Sloan v. Union Bkg. Co.* 67 Pa. 470; *Sistermans v. Filed*, 9 Gray, 331; *Thompson v. Armstrong*, 7 Ala. 256; *Ross v. Drinkard*, 35 Ala. 434; *Kelly v. Ford*, 4 Iowa, 140; *Harbison v. State Bank*, 28 Ind. 133; *Merchants & P. Nat. Bank v. Masonic Hall Trustees*, 62 Ga. 271; *Duerson v. Alsop*, 27 Gratt. 249; *Boyd v. McIver*, 11 Ala. 822; *Perkins v. Prout*, 47 N. H. 387; *Woodhull v. Holmes*, 10 Johns. 231; *McKesson v. Stanberry*, 3 Ohio St. 156; *Hall v. Featherstone*, 3 Hurlst. & N. 284; *Bailey v. Bidwell*, 13 Mees. & W. 73; *National Bank of North America v. Kirby*, 108 Mass. 497; *Emerson v. Burns*, 114 Mass. 348; *Maples v. Browne*, 48 Pa. 458.

It is evident from the most cursory examination of these authorities that the principle referred to is absolutely controlling. But in order that the proof of fraud may shift the burden of proof, it must be a fraud committed upon the maker; fraud against the payee or indorsee is insufficient. *Kinney v. Kruse*, 28 Wis. 183. See *Atlas Bank v. Doyle*, 9 R. I. 76.

e. **In Cases of Lost or Stolen Instruments.**—The burden of proof is also shifted to the holder, when it is shown that the instrument has been stolen or lost. *Union Nat. Bank v. Barber*, 56 Iowa, 559; *Worcester County Bank v. Dorchester & M. Bank*, 10 Cush. 488; *Matthews v. Poythress*, 4 Ga. 287; *Merchants & P. Nat. Bank v. Masonic Hall Trustees*, 62 Ga. 271.

The holder, in the case of fraud or illegality being proven, establishes his prima facie case again, by showing that he paid full value for it and took it in the ordinary course of business and before maturity. He is not required to prove that he took the paper without notice of the fraud or illegality. The burden of proving notice is thrown upon the defendant. Although there are decisions to the contrary (*Tilden v. Barnard*, 43 Mich. 376, *Marston, J.*), the weight of authority supports the doctrine here laid down. *Davis v. Bartlett*, 12 Ohio St. 541. See also, to the

same effect, *Kellogg v. Curtis*, 69 Me. 214; *Harbison v. State Bank*, 28 Ind. 133; *Battles v. Laudenslager*, 84 Pa. 446; *Tod v. Wick*, 36 Ohio St. 390; *Johnson v. McMurry*, 72 Mo. 282. In *Wortendyke v. Meehan*, 9 Neb. 229, where the holder paid value, it was held that he could not recover, since he did not deny having knowledge of the illegality.

§ 85. **Burden of Proof in Matrimonial Actions.**—In matrimonial actions the burden of proof is usually with the plaintiff, though there are exceptions to this rule, as to most others, which will be subsequently considered. A suit for divorce is a proceeding *sui generis*. While it may partake of the nature of a chancery suit, it is also ecclesiastical, and is therefore in strictness neither a civil suit nor a criminal prosecution. The rules of evidence in divorce cases are therefore not well defined. Not only are all causes for divorce offenses against the State, which is a party to the marriage, and many of them, such as adultery, cruelty (assault and battery), crimes, but the results of a divorce are far reaching, in that they affect offspring and society at large. The party charged with a matrimonial offense must be presumed innocent until proved guilty; the burden of proof is on the complainant to establish his case by a preponderance of proof, and even, it has been held, beyond a reasonable doubt, according to the rule, that "if the commission of a crime is directly in issue in any proceeding, civil or criminal, it must be proved beyond a reasonable doubt." The proof must therefore in all cases be full, clear and satisfactory, and the graver the offense charged, the stricter is the proof required.

§ 86. **The Scintilla Doctrine Considered.**—Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Ryder v. Wombwell*, L. R. 4 Exch. 39.

Decided cases may be found, where it is held that if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit: that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but wheth-

er there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Improvement & R. Co. v. Munson*, 81 U. S. 14 Wall. 448, 20 L. ed. 872; *Pleasants v. Funt*, 89 U. S. 22 Wall. 120, 22 L. ed. 782; *Parks v. Ross*, 52 U. S. 11 How. 373, 13 L. ed. 735; *Merchants Bank v. State Bank*, 77 U. S. 10 Wall. 637, 19 L. ed. 1015; *Hickman v. Jones*, 76 U. S. 9 Wall. 201, 19 L. ed. 553.

§ 87. **Opening the Case; Rights of the Parties.**—The legal principle is now well established that the burden of proof is cast upon the party holding the affirmative position, and by this is meant the affirmative in substance, not the affirmative in form. To this extent, then, the law of evidence imposes an obligation, in that it casts this burden of proof upon the affirmative, but as compensatory and as an inseparable accompaniment of this burden, is the advantage of opening the case.

a. **Of Great Importance.**—The right to begin is a matter of great importance in a trial by jury, as the party who begins has a right to make the closing address to the jury; and this latter right, when exercised by a skillful advocate, is often the means of securing a verdict in favor of the party holding the affirmative of the issue, even in a doubtful cause, and notwithstanding the clear and impartial charge of the judge. *Lindsley v. European Petroleum Co.* 41 How. Pr. 56; *Elwell v. Chamberlin*, 31 N. Y. 611.

It generally follows that the party entitled to commence his evidence is entitled to close, and under our present system of pleading it very frequently occurs that the defendant has the affirmative, and when he has it has been also generally admitted that he was entitled to open and close the case to the jury.

b. **The Present and the Former Rule.**—Under our former system of practice, if the defendant did not plead the general issue, and sought to avoid it by some affirmative defense, the rule and practice of the courts in England prevailed. 2 Dunlap, Pr. 637; 1 Paine & Duer, 522; Gra. Pr. 289. That rule is announced in an authoritative and able work on the practice of the court of king's bench, where the author observes: "It has been laid down as a general rule, that the party who has to maintain the affirmative of the issue must begin the evidence. Where there are special pleadings, or where a special defense is not intended to be given in evidence under the general issue, it may, perhaps, be more accurate to say that the party who has added the *similiter* shall begin.



If both parties, however, have added the *similiter* to the different sets of pleadings in the same cause, then the plaintiff shall begin. When a special defense is intended to be given in evidence under the general issue, the party shall begin who would have been entitled to do so, if the defense had been specially pleaded." 1 Arch. Pr. 169, 170.

In *Jackson v. Hesketh*, 2 Stark. N. P. 518, it was held, that when the affirmative of an issue lay upon the defendant he had the right to begin. Bayley, *J.*, after having consulted Wood, *B.*, said they were both of them of the opinion that the defendant was entitled to begin. In the case of *Goodtitle v. Braham*, 4 T. R. 497, the question was who was entitled to the reply, in an action of ejectment, when the lessor of the plaintiff claimed as heir-at-law, and the defendant was devisee, and the court decided (upon a trial at bar) that if the plaintiff proved his pedigree and stopped, and the defendant set up a new case, which the plaintiff answered by evidence which ultimately went to the jury, the defendant should have the general reply, and Buller, *J.*, said he had so ruled at Winchester in 1789. The general rule prevailing in this country and in England is well stated in Bouvier, Inst., 323, § 3043, as follows: "That the party who alleges the affirmative of any proposition or issue of facts should prove it, because a negative does not in general admit of the simple and direct proof of which the affirmative is capable, and therefore the party who has to maintain or prove the only affirmatives must begin the evidence." See also the case of *Huntington v. Conkey*, 33 Barb. 218, where, in the opinion of *Mr. Justice Smith*, the authorities are collected, and the doctrine clearly stated. In that case the action was upon a promissory note, which was set out in the complaint. The answer admitted the making of the note, and set up the defense of usury. The plaintiff in that case was entitled to a verdict, if no evidence had been offered on the trial; and the judge at the circuit held that the counsel for the plaintiff had the right to open the case to the jury, and to reply. See also *Elwell v. Chamberlin*, 31 N. Y. 611.

**c. Party must Exercise His Right.**—The party having the right to begin must exercise it; and on failure to do so the court may compel him to open his case and produce his evidence. *Slawson v. Englehart*, 34 Barb. 198; *Brandford v. Freeman*, 5 Exch. 734; *Coxhead v. Huish*, 7 Carr. & P. 63.

d. **The Rule in Cases of Libel and Slander.**—In all cases of slander, libel and other actions where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant. *Carter v. Jones*, 6 Carr. & P. 64; *Young v. Highland*, 9 Gratt. 16; *Hecker v. Hopkins*, 16 Abb. Pr. 301, note; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Fry v. Bennett*, 28 N. Y. 324. See *Harnett v. Johnson*, 9 Carr. & P. 206; *Chapman v. Rawson*, 8 Q. B. 673.

Whenever the plaintiff has anything to prove, on the question of damages, or otherwise, he has the right to begin. *Huntington v. Conkey*, 33 Barb. 218; *Thurston v. Kennett*, 22 N. H. 151; *Belknap v. Wendell*, 21 N. H. 175; *Comstock v. Hadlyme Eccl. Soc.* 8 Conn. 254; *Lexington F. L. & M. Ins. Co. v. Paver*, 16 Ohio, 324; *Bowen v. Spears*, 20 Ind. 146.

e. **Where Damages are Liquidated.**—In other cases, where the damages are liquidated, or depend upon mere calculation—as the casting of interest—the party holding the affirmative of the issue has a right to begin, and the affirmative in such cases will be with the party against whom a verdict may be given, provided no evidence were given at the trial. *Huntington v. Conkey*, *supra*; *Elwell v. Chamberlin*, 31 N. Y. 611; *Horie v. Green*, 37 How. Pr. 97; *Geach v. Ingall*, 14 Mees. & W. 95.

f. **Object of the Opening; What may be Stated.**—The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts and the substance of the evidence counsel is about to introduce. Plaintiff's counsel, in opening, may also state the nature of the defense, if it appears upon the record, and the manner in which he proposes to dispose of it. Counsel has not a right to state intended evidence in detail, nor to read documents he proposes to offer, so as to get matter before the jury without opportunity for the court to decide upon its admissibility. But he may state the material facts he relies on, and in so doing may refer to documents to refresh his memory. It is a matter of discretion with the judge, whether he will allow the pleadings to be read to the jury except so far as they have first been put in evidence. If they contain irrelevant allegations raising issues improper for the jury's consideration it is proper to prohibit them from being read. If the counsel's opening discloses a fatal objection to his action or defense, or if he

expressly puts his case solely on a ground untenable in point of law, the court may refuse to hear evidence in support of it, and dismiss the complaint and direct a verdict. To justify granting such a motion, the admission must be one which is necessarily fatal to the case. It is not good practice to grant such a motion, unless the opening has been taken down by the stenographer, or the statements relied on are noted in writing. Abb. Tr. Br. 40; Colo. Code Proc. 418.

When the defendant claims to hold the affirmative, and to have the right to open and close, he is called upon to make it appear beyond all reasonable doubt that he has admitted the essential facts upon which the plaintiff bases his right of action, and he cannot call upon the court to make a critical examination of the pleadings to determine whether he is entitled to the privilege or not. *Claflin v. Baere*, 28 Hun, 204.

The counsel for plaintiff in opening may also state the nature of the defense as it appears upon the record, but further than this he ought not to go. *Ayrault v. Chamberlain*, 33 Barb. 229; *Elwell v. Chamberlin*, 31 N. Y. 611-614. See *Morris v. Wadsworth*, 17 Wend. 118.

**g. Difficulty of Formulating a General Rule.**—No precise rule can be laid down as to the extent to which counsel may go in opening a case to the jury; and while the court may interfere in the interest of justice to restrain undue license on the part of the counsel, the exercise of the power is a matter of discretion which will not be proper subject of exception. *Walsh v. People*, 88 N. Y. 458.

**h. Undue License in Opening a Case or in Addressing the Jury.**—Under all systems of jurisprudence, great latitude has been accorded counsel in addressing the jury, provided they restrain all remark that is not justified by the evidence; but under the liberalizing tendencies of recent years, this freedom of speech has been grossly abused, and it is a matter of daily occurrence, in almost every court in this country, to hear argument and criticism upon the alleged merits or demerits of a cause, entirely unwarranted by the evidence, and at utter variance with well-settled principles of procedure. While it is difficult to formulate any rule broad enough in its scope and nature to meet the requirements of every case, we may assume that any statement made by counsel in addressing the jury which is not sustained by the evi-

dence, or is at least a reasonable implication from the evidence, is reversible error. This abuse of forensic function by attorneys has received considerable attention from the judiciary of late years, and there is a manifest tendency to correct this abuse, on the part of the appellate courts, by summarily ordering a new trial.

**i. Free Latitude Allowed.**—The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing and appealing to prejudices irrelevant to the case and outside of the proof. If counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial or a reversal. *Brown v. Swineford*, 44 Wis. 282.

**j. A Recent Case Considered.**—When counsel are permitted to state facts in argument, and to comment upon them, the usage of courts regulating trials is departed from, the laws of evidence are violated and the full benefit of trial by jury is denied. It may be said in answer to these views that the statements of counsel are not evidence; that the court is bound so to instruct the jury, and that they are sworn to render their verdict only according to evidence. All this is true, yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to the circumstances, and if they in the slightest degree influence the finding, the law is violated and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to make them. It is unreasonable to believe the jury will entirely disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested. *Tucker v. Henniker*, 41 N. H. 325.

**k. Instance of Improper Opening.**—An instance of improper conduct on the part of counsel is here given by way of illustration. In the case of *Chase v. Chicago*, 20 Ill. App. 274, which was an action brought by plaintiff to recover damages sustained by her stepping into a hole in the sidewalk, in the City of Chicago, and breaking her leg, the counsel for the city, in the course of his argument, stated over the objection of Mr. Gibbons, the plaintiff's attorney, that in the position occupied by him as city attorney, it was customary for him to try cases brought against the city, some of which were meritorious, and others based upon fraud and perjury; that it became his duty, as representative of the taxpayers of the city, to characterize this as one of the cases which had not a shadow of merit, a case based upon fraud and perjury, and maintained by a conspiracy between John Gibbons, plaintiff's attorney, and Dr. Angaer; that it was a blackmailing scheme to extort money from the city; that he hoped the jury would remember, after they had retired to their jury room, that Mrs. Chase was very little interested in the result; that the amount of verdict which they would give her would be divided into three equal parts, one third going to Mrs. Chase, one third to Dr. Angaer and one third to John Gibbons; that he hoped the jury would not permit these men, who came from Iowa—this Iowa contingent—to profit by such a conspiracy. Thereupon he turned around in a threatening and boisterous manner, stood in front of John Gibbons, where he was sitting, shook his fist in front of his face and halloed at the top of his voice, repeating the question three times: "Why didn't you put Mr. Chase upon the witness stand, John Gibbons?" and answering, "I will tell you why, because you knew that that gray-haired old man would not perjure himself for you, and you could not perpetrate this fraud and conspiracy with his assistance." In delivering the opinion of the court, McAllister, *P. J.*, said: "There are cogent reasons why appellate courts should be careful and critical in recognizing alleged improper statements of counsel in argument as affording ground for reversal. But every case must depend upon its own circumstances. It would seem consistent with the ordinary principles upon which justice is administered, that if in this case the statements complained of were material, and this court can see, from an examination of the evidence, that they were likely to and probably did wrongly influence and mislead the jury to return the verdict against the plaintiff to her manifest prejudice, this court

should redress the wrong by reversing the judgment. We think such is the case."

1. **Further Illustrations of Impropriety; Reprimand by the Court.**—In *Brow v. State*, 1 West. Rep. 180, 103 Ind. 133, the prosecuting attorney said he knew personally the saloon-keeper in this case, and that he was guilty of this and he was sure of other crimes. This was held to be sufficient to justify a reversal, the court having refused to instruct the jury to disregard improper matter outside of the record. In *People v. Dane*, 59 Mich. 550, the prosecuting attorney said he knew that the defendant was the man who took the money, and this was sufficient ground for reversing the judgment. In *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575, the judge at the trial permitted counsel, in opening the case, to read, against objection, papers not admissible in evidence, and which were not afterwards offered in evidence. This was held to be such an abuse of discretion as to require the granting of a new trial; and it was further held that the error was not cured by a subsequent instruction to the jury to disregard said papers. In *Martin v. Orndorff*, 22 Iowa, 504, the counsel were permitted to read and comment upon testimony taken at a former trial between the same parties; and this was held to be error sufficient to call for a reversal, and that the error was not cured by a charge to the jury not to consider said testimony. In *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 813, the prosecuting attorney said to the jury: "Martin, the defendant, is a man of bad, dangerous and desperate character; but I am not afraid to denounce the butcher boy, although I may, upon returning to my home, find it in ashes over the heads of my defenseless wife and children." No objection was made to this language and the trial court did not interfere. The supreme court held that it was the duty of the presiding judge to interfere in such a case, of his own motion, and granted the defendant a new trial. In *Perkins v. Burley*, 6 New Eng. Rep. 817, 64 N. H. 524, counsel for the prevailing party, in his closing argument, said to the jury, that if they knew how the plaintiff and his father and brother (who were witnesses for him) were regarded in the vicinity in which they lived, he would be willing to submit the case without argument. This was held to be sufficient ground for setting aside the verdict. In *Baldwin v. Grand Trunk R. Co.*, 64 N. H. 27, plaintiff's counsel told the jury that a Texas jury had given a verdict for ten thousand dollars in a similar case and

that another jury had given a verdict for eight thousand or ten thousand dollars against this defendant in another case. This was held to be error, and not to have been cured by the fact that the statement was made in an altercation begun by defendant's counsel. In *Reich v. New York*, 12 Daly, 72, plaintiff's counsel attempted to read to the jury a reported case; but on objection being made he closed the book, and stated what the case held, saying that that case was on "all fours" with the case on trial. The court declined to stop him, and it was held error. In *House v. State*, 9 Tex. App. 567, the prosecuting attorney, in his argument to the jury, told them, that if the State of Texas had an assistant attorney-general worth a cent, this cause would have been reversed on a former appeal; and if there should be a conviction of defendant this time, he would see that a correct statement of facts went up, on the next appeal, and that the court of appeals would affirm the verdict. The court of appeals severely reprimanded counsel, and reversed the judgment.

§ 88. **Personal Abuse.**—Undignified and uncalled-for personal abuse by counsel in argument, of the accused, or of witnesses, or of jurors, calculated to inflame the passions of the jury, and to materially prejudice the accused in the trial, is sufficient to call for a reversal of the judgment. *Bessette v. State*, 101 Ind. 85; *Bedford v. Penny*, 58 Mich. 424; *State v. Williams*, 65 N. C. 505; *State v. Smith*, 75 N. C. 306; *State v. Noland*, 85 N. C. 576; *Ricks v. State*, 19 Tex. App. 308; *Stone v. State*, 22 Tex. App. 185. In *Bessette v. State*, 101 Ind. 85, the prosecuting attorney, in addressing the jury, said of the defendant: "Luke Bessette has a bad looking face; I ask you to just look at his face; you have a right to look at his face, and I have a right to ask you to look in his face, and as prosecuting attorney I have a right to comment upon it; if his face does not show him to be a bad man, then I am not a good judge of the human countenance." In the course of his argument to the jury he further said: "The defense has already succeeded, perhaps, in making a young man on the jury believe that this is a blackmailing scheme. I think I know who he is, and I think he has become greatly impressed with the theory." The supreme court granted the prisoner a new trial. The court, after severely criticising the conduct of the prosecuting attorney in referring to the personal appearance of the accused as he had done, said:

“The personal allusion made to the probable state of mind of one of the jurors was yet more reprehensible. To be thus singled out from his fellow jurors, and put under surveillance, was well calculated to impair the independence of mind and judgment which it was the right and duty of the juror to maintain until convinced by the evidence and the fair and legitimate argument of counsel.” In *State v. Williams*, 65 N. C. 505, the counsel said: “Will you give a verdict upon the evidence of this Pennsylvania Yankee, this rich Square grog-shop keeper?” In *State v. Smith*, 75 N. C. 306, the language employed by counsel was as follows: “The bold, brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me that if I did, he would get the Legislature to impeach me.”

a. **Extreme Cases Cited.**—In *State v. Voland*, 85 N. C. 576, the prosecuting attorney in his argument declared that two of the jurors in the case had gone into the box with souls blackened with perjury and bribery. He also walked over to the jury box and stepped on the foot of one of the jurors, saying, after he had done so, “Beg pardon, I wanted to wake you up.” The juror was not asleep, nor did he appear to be so. The supreme court granted a new trial for the misconduct of the counsel. In *Ricks v. State*, 19 Tex. App. 308, the district attorney in his argument to the jury said: “The witnesses against the defense have sworn lies and have come here for that purpose. I will show it by the testimony. They know that they have sworn lies, and if it was not so they would not allow me to say it, but would make mince meat out of me when I charge them with having done so.” Hurt, *J.*, in delivering the opinion of the court of appeals, said: “We deem it proper, yea, an imperative duty on our part, to sternly and emphatically condemn such conduct. Such bullying and defiant conduct was highly calculated to produce the most serious results; and that, too, in the very temple of justice, a place in which the highest order and decorum should be preserved.”

b. **Restraining Use of Degrading Language.**—Language calculated to humiliate and degrade defendant in the eyes of the jury and by-standers, particularly when he has not been impeached, cannot be permitted on the part of the counsel, and where it is not checked, and where it is persisted in after warning from the court, it will be ground for granting a new trial. *Coble v. Coble*, 79



N. C. 589, 28 Am. Rep. 338; *Hatch v. State*, 8 Tex. App. 416, 34 Am. Rep. 751. In *Coble v. Coble*, *supra*, the plaintiff's counsel in his closing remarks to the jury said, that no man who had lived in defendant's neighborhood could have anything but a bad character; that defendant had polluted everything near him, or that he touched; that he was like the upas tree, shedding pestilence all around him. Bynum, *J.*, in delivering the opinion of the court, said: "Such an assault is no part of the privilege of counsel, and was well calculated to influence the verdict of the jury. The defendant's counsel interposed his objections in apt time and upon the instant, but they met with no response from the court, and for this error there must be a *renire de novo*."

**§ 89. In Criminal Cases the Rule is That the Burden of Proof never Shifts.**—In all criminal cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment. *Com. v. McKie*, 1 Gray, 64; *Com. v. York*, 9 Met. 125; *Com. v. Webster*, 5 Cush. 305; *Com. v. Eddy*, 7 Gray, 584; *Com. v. Wright*, Ben. & H. L. Cr. Cas. 299.

**a. Distinction between Civil and Criminal Cases as Regards Quantum of Evidence.**—Text-writers of the highest authority state that there is a distinction between civil and criminal cases in respect to the degree or *quantum* of evidence necessary to justify the jury in finding their verdict. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates; but in criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. 3 Greenl. Ev. (8th ed.) § 29; 1 Taylor, Ev. (6th ed.) 372. Beyond question the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue; but the burden may shift during the progress of the trial. Possession of a negotiable instrument payable to bearer or indorsed in blank is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same; but if the defendant prove that the instrument was fraudulent in its inception, or that it had been lost or stolen before he became the holder, the burden of proof is changed and the *onus* is cast upon the plaintiff to prove that he gave value for it when he became the holder. *Lilienthal's Tobacco v. United States*, 97 U. S. 237, 24 L. ed. 901.

**b. Plaintiff "Rests" after Proving a Prima Facie Case.—**

Examples of like character, almost without number, might be given; but it is unnecessary, as everyone knows that the plaintiff in every case may safely rest when he has introduced proof to make out a prima facie case. Authorities to show that the case before the court is a civil case are scarcely necessary, but if any be needed they are at hand. 1 Bish. Cr. L. (6th ed.) § 835; *United States v. Three Tons of Coal*, 6 Biss. 379; *Schmidt v. New York U. Mut. F. Ins. Co.* 1 Gray, 533; *Knowles v. Scribner*, 57 Me. 497.

**§ 90. Party Having Affirmative should Open and Close Case; This Rule Practically without Exception.—**It is a cardinal rule of evidence that the party having the affirmative of the issue in an action should have the opportunity to make the opening and closing presentation of his case to the jury, and this is deemed a substantial right, the denial of which is error. *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278.

For further authorities in support of this proposition, see *Johnson v. Josephs*, 75 Me. 545; *Sillivant v. Reardon*, 5 Ark. 140; *Leete v. Gresham L. Ins. Soc.* 7 Eng. L. & Eq. 578; *Bertrand v. Taylor*, 32 Ark. 476; *Dille v. Lowell*, 37 Ohio St. 415; *Simmons v. Green*, 35 Ohio St. 104; *Thurston v. Kennett*, 22 N. H. 15; *Buzzell v. Snell*, 25 N. H. 474; *Conselyea v. Swift*, 5 Cent. Rep. 795, 103 N. Y. 604; *Churchill v. Lee*, 77 N. C. 341; 1 Taylor, Ev. §§ 338, 339, 341; Bailey, Onus Probandi, 607; Best, Right to Begin, 87, 92-94; Estee, Pleadings and Forms, 400; *Patterson v. Carrell*, 60 Ind. 128; *Smith v. Nevlin*, 89 Ill. 193; *Taylor v. Reese*, 44 Miss. 89; *Balmer v. Sunder*, 11 Mo. App. 454; *Horie v. Green*, 37 How. Pr. 97; *Hale v. Rice*, 124 Mass. 292; *Levison v. Schwartz*, 22 Cal. 229; *Rhyan v. Dunnigan*, 76 Ind. 178; *Jones v. Witter*, 13 Mass. 304.

From a combination and comparison of the results legitimately enforced by these decisions the true doctrines and correct rules relating to this branch of the law of evidence may be ascertained and collected, in such a manner as to show the logical development of the present rule.

**§ 91. Proof of Negative Pregnant.—**Generally speaking, evidence in support of a denial, which is in the form of a negative pregnant, is inadmissible. This occurs in all instances where the denial is couched in the precise language of the complaint or petition. It

implies in legal contemplation that the alleged facts may have transpired on some other day or under different circumstances. *Davison v. Powell*, 16 How. Pr. 467; *Schaetzel v. Germantown Farmers Mut. Ins. Co.* 22 Wis. 412; *Salinger v. Lusk*, 7 How. Pr. 430; *Frasier v. Williams*, 15 Minn. 294; *Harden v. Atchison & N. R. Co.* 4 Neb. 521; *Holden v. Kirby*, 21 Wis. 149; *Cuthbert v. Appleton*, 24 Wis. 383; *Shearman v. New York Cent. Mills*, 1 Abb. Pr. 187; *Baldwin v. United States Teleg. Co.* 6 Abb. Pr. N. S. 405; *Lawrence v. Cabot*, 9 Jones & S. 122; *Nolan v. Skelly*, 62 How. Pr. 102; *Bradbury v. Cronise*, 46 Cal. 287; *Young v. Catlett*, 6 Duer, 437; *Crane v. Morse*, 49 Wis. 368; *Norris v. Glenn*, 1 Idaho, 590; *Dole v. Burleigh*, 1 Dak. 227; *Dean v. Leonard*, 9 Minn. 190.

Evidence to meet the averments of a denial in the form of a negative pregnant is unnecessary. The court, of its own motion, should direct a judgment for the plaintiff. When a verified complaint contained many distinct allegations conjunctively stated, and the answer consisted of denials of these averments, *in ipsius verbis*, also conjunctively stated, following in this manner the exact language of the entire complaint, the court ordered a judgment for the plaintiff on the pleadings, saying: "This mode of answering is in violation of the principles of common-law pleading, and not less so of the Statute which provides that the defendant's answer to a verified complaint shall contain a specific denial of each allegation controverted, or a denial thereof according to the defendant's information and belief." *Fish v. Redington*, 31 Cal. 185, 194. The complaint in an action to recover possession of chattels alleged that "defendant unlawfully and wrongfully seized and took said property," etc. This answer, it was held, admitted the taking. *Woodworth v. Knowlton*, 22 Cal. 164. See also *Feely v. Shirley*, 43 Cal. 369; *Harris v. Shontz*, 1 Mont. 212, 216; *Toombs v. Hornbuckle*, 1 Mont. 286. It is the settled rule in California that conjunctive denials, in the very language of conjunctive allegations, raise no issues. *Blankman v. Vallejo*, 15 Cal. 638; *Kuhland v. Sedgwick*, 17 Cal. 123; *Causfield v. Sanders*, 17 Cal. 569; *Landers v. Bolton*, 26 Cal. 393; *Busenius v. Coffee*, 14 Cal. 91.

§ 92. **Citation of Recent Authority in Support of the Foregoing Rules.**—Where a fact is more particularly within the knowledge of one party than the other, the burden of proving it is on such party. *Weber v. Rothchild*, 15 Or. 385.

It is necessary for a party to prove the substantive facts which he is required affirmatively to allege in his pleadings. *Freeman v. Travelers Ins. Co.* 4 New Eng. Rep. 621, 144 Mass. 572.

In condemnation proceedings the burden of showing the necessity of the railroad contemplated, and its construction over the land in question, is on the company petitioning. *Grand Rapids & I. R. Co. v. Weiden*, 14 West. Rep. 643, 70 Mich. 390.

Where the Statute of Limitations is set up in bar, the burden is on the plaintiff. *Slocum v. Riley*, 5 New Eng. Rep. 279, 145 Mass. 370.

Where conditions precedent to the existence of an agency are imposed, and must be performed before a delegated authority goes into existence at all, the burden rests upon the party claiming to bind the principal by the agent's acts, to show that such conditions have been fulfilled. Authorities cited in *Parker v. Saratoga County*, 9 Cent. Rep. 276, 106 N. Y. 392.

Where a party seeks to exclude evidence of a physician, under N. Y. Code, sec. 834, the burden is upon him to bring that case within its purview. Authorities cited in *People v. Schuyler*, 8 Cent. Rep. 772, 106 N. Y. 298.

A party is presumed to waive a right when his acts are wholly inconsistent with the assertion and exercise of the right. *The Dictator*, 30 Fed. Rep. 637.

The burden of proof remains on a party affirming a fact in support of his case, and does not change in any aspect of the cause; while the weight of evidence shifts from side to side during the progress of the trial, according to the nature and strength of the proof offered in support or denial of the main fact to be established. *Scott v. Wood*, 81 Cal. 398.

In an action for libel in the publication of an article charging the commission of a crime it is generally sufficient to prove the publication, and it not necessary to prove that the charges contained in the article were false, since the law presumes such charges to be false, and casts the burden of proving them true upon the person making them. *Grace v. Dempsey*, 75 Wis. 313.

When a duty incumbent on directors of a company has not been performed, the burden of proving gross negligence is on those who allege that conclusion; but where the facts establish gross negligence, but at the same time show that it is possible or likely that a satisfactory explanation ought to be forthcoming, the

burden of proof is shifted. *Re Liverpool Household Stores Asso.* (Eng. Ch. Div.) 8 R. R. & Corp. L. J. 227.

Collision of one vessel with another raises a prima facie inference that there was negligent navigation on the part of those in charge. *The Britannia*, 43 Fed. Rep. 96.

The burden of proof is on the contestants to invalidate a will which has been admitted to probate. *Behrens v. Behrens*, 47 Ohio St. 323.

The burden of proof is upon the defendant to establish, by preponderance of the evidence, every material allegation of his answer concerning a counterclaim set up by him. *Champion Mach. Co. v. Gorder* (Neb.) 46 N. W. Rep. 253.

In an action for personal injuries sustained by plaintiff while riding as a passenger on a hand-car in violation of the company's rules, the burden of proof is on plaintiff to show by a preponderance of evidence that at the time of the injuries the servants were acting within the scope of authority conferred upon them by the company. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 Tex. 228.

If the facts set out in an affidavit for attachment are denied in a motion for dissolution, the burden of proof is cast upon the plaintiff to make them good by other affidavits or other proof in addition to that contained in his affidavit for the writ. The affirmative is upon him. *Wyman v. Wilmarth* (S. Dak.) 46 N. W. Rep. 190.

A vessel by whose sheer a collision is caused has the burden of proving that it was inevitable. *The Sagua v. The Grace*, 42 Fed. Rep. 461.

The burden of proof is upon the carrier to show that a loss of freight occurred without fault on its part. *Southern Exp. Co. v. Seide*, 67 Miss. 609.

A complainant must prove all material allegations in his bill which are neither admitted nor denied by the answer. *Gros v. Randolph*, 133 Ill. 197.

Where, after an answer pleading the Statute of Limitations, the complaint is amended by alleging that suit had been theretofore brought and dismissed, plaintiff assumes the burden of proving such allegation. *Memphis & L. R. Co. v. Shoecraft*, 53 Ark. 96.

If the validity of a deed depends on an act *in pais*, the party claiming under it is bound to prove the performance of the act. *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923.

The burden of proving that one to whom a telegram is addressed

lives within the limits of free delivery is on the plaintiff in an action for non-delivery of a message. *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510.

The rule that the burden of proof is upon an attaching creditor to show the invalidity of an assignment by the debtor is applicable whether the creditor is a plaintiff or defendant. *Mack v. Davidson* (Super. Ct. N. Y.) 30 N. Y. S. R. 805.

Where parties occupy a relation of trust and confidence, such as that of a parent and child, and the circumstances show that one has reaped an undue advantage over the other, or if it appears that the capacity of one is such that the parties did not deal on terms of equality, the transaction is presumed fraudulent unless it is affirmatively established that the stronger party practiced no deception and used no undue influence. *Toms v. Greenwood* (Super. Ct. Buff.) 30 N. Y. S. R. 478.

The general rule that the burden of establishing affirmatively freedom from contributory negligence is upon the plaintiff is not to be relaxed in favor of one who was being carried in a vehicle owned and driven by another at the time of an accident which occurred at a railroad crossing. *Brickell v. New York Cent. & H. R. R. Co.* (Ct. App.) 30 N. Y. S. R. 932.

A defendant moving for a change of venue on the ground that the cause of action arose in another county has the burden of proving the fact. *Chase v. South P. C. R. Co.* 83 Cal. 468.

Proof must be so clear and convincing as to satisfy every reasonable mind, in order to establish charges of corrupt, fraudulent and criminal conduct against persons deceased, who have occupied positions of trust, and whose acts have been authorized and confirmed by a court of competent jurisdiction. *Egan v. Grece*, 79 Mich. 629.

One who denies the authority of the president and secretary of a corporation to execute a contract which is regular on its face has the burden of proving the denial. *Sherman Center Town Co. v. Swigart*, 43 Kan. 292.

A party alleging undue influence must prove it either directly or by establishing such circumstances as will warrant a presumption thereof. *Dumont v. Dumont*, 46 N. J. Eq. 223.

A defendant who pleads contributory negligence as a defense assumes the burden of proving it. *San Antonio & A. P. R. Co. v. Bennett*, 76 Tex. 151.

The burden of establishing contributory negligence is not on

the defendant, where plaintiff's own testimony also inculcates himself. *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247.

A carrier has the burden of proving that goods were not in good condition when received from a connecting carrier. *Beard v. Illinois C. R. Co.* 7 L. R. A. 280, 79 Iowa, 518.

The maker of negotiable paper is always presumed, in the absence of evidence, to have issued it clear of all blemishes, erasures and alterations; and the burden of showing that it was defective when issued is upon the holder. *Hess's App.* 134 Pa. 31.

On the production of an instrument, if it appears to have been altered, it is incumbent on the party offering it in evidence to explain its appearance. *Rodriguez v. Hayes*, 76 Tex. 225.

The burden of proof is on the party alleging that promissory notes were accepted as payment. *Bradley v. Harwi*, 43 Kan. 314.

The burden of proving the law of another State rests upon the party claiming rights under it; and in the absence of such proof the trial court is authorized to presume that the same rule of law which obtains there obtains in the other State, it being founded in the principles of the common law, and not the necessary outgrowth of a local and peculiar statute. *Conrad v. Fisher*, 8 L. R. A. 147, 37 Mo. App. 352.

The burden of proving delivery and acceptance of goods sold so as to take the case out of the Statute of Frauds rests upon the person setting up the contract. *Harris Photographic Supply Co. v. Fisher*, 81 Mich. 136.

A person alleging usury assumes the burden of proving it by a preponderance of evidence. *Telford v. Garrels*, 132 Ill. 550.

A railroad company has the burden to overcome the presumption of negligence which arises against it from the mere fact of a collision, by proof that the accident happened notwithstanding the highest degree of care and prudence on its part. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126.

Evidence that one suing a railroad company for injuries to his adjoining lands, from fire communicated from a locomotive right of way, was at the time of the burning in quiet and peaceable possession of all the lands injured, is prima facie evidence of his title as against the company not asserting title thereto, and casts the burden upon the latter to show that some other person was

the owner. *Moore v. Chicago, M. & St. P. R. Co.* (Wis.) 47 N. W. Rep. 273.

The rule that when a note is shown to have been obtained by fraud it devolves upon the holder to show that he is a good-faith purchaser should prevail in all cases where the answers show that the note originated in fraud. *Huntington First Nat. Bank v. Ruhl*, 122 Ind. 279.

A guardian who makes an informal settlement with, and obtains a release from, his ward, assumes the burden of making it clearly appear that he fully and fairly disclosed the condition of the ward's estate, and that he paid over the amount found due, either in money or securities. *Line v. Lawder*, 122 Ind. 548.

A party charged with fraud is presumed innocent until it has been shown that he is guilty. *Gaines v. White* (S. Dak.) 47 N. W. Rep. 524.

A court of equity will not presume fraud, but it must be proved, or facts clearly proved from which fraud can be legitimately inferred. *Bradfield v. Elyton Land Co.* (Ala.) 8 So. Rep. 838.

The burden of showing the negligence of defendant pleaded as a cause of action rests on the plaintiff; and to meet a case proved by plaintiff, by showing contributory negligence on his part, the burden rests upon the defendant. *Comer v. Consolidated Coal & Min. Co.* (W. Va.) 12 S. E. Rep. 476.

The party alleging the insanity of a person has the burden of establishing it by a preponderance of proof. *Greene v. Phoenix Mut. N. Ins. Co.* 10 L. R. A. 576, 134 Ill. 310.

The burden of proof is on the party seeking to avoid a deed on the ground of infancy, to show beyond reasonable doubt that the deed was made at a time when she was under the disability of infancy. *Aney v. Cockey* (Md.) 19 Wash. L. Rep. 163.

As a rule the burden of proof remains where the issue made by the pleadings places it, although the weight of the evidence on one side may have a controlling effect, unless met by proof of the other party. *Blunt v. Barrett* (Ct. App.) 35 N. Y. S. R. 64.

The burden of proof and the corresponding right to open and close the argument in a proceeding to condemn land rest on the party seeking the condemnation, and not upon the owner of the land. *Ft. Worth & R. G. R. Co. v. Culver* (Tex. App.) 14 S. W. Rep. 1013.

Where it is necessary to sustain an issue as to whether a party



has due license to perform a certain act, the party claiming the license and the right to act under it must sustain his license by competent proof. *State v. Lipscomb*, 52 Mo. 32; *Garland v. Lane*, 46 N. H. 245; *State v. Crowell*, 25 Me. 174; *United States v. Hayward*, 2 Gall. 485; *Rex v. Turner*, 5 Maule & S. 205; *Bluck v. Rackham*, 5 Moore, P. C. 305, 314; *Morton v. Copeland*, 16 C. B. 517; *Smyth v. Jefferies*, 9 Price, 257. *Contra, Com. v. Thurlow*, 24 Pick. 374; *Kane v. Johnston*, 9 Bosw. 154; *State v. Evans*, 5 Jones, L. 250; *Mehan v. State*, 7 Wis. 670; *State v. Hirsch*, 45 Mo. 429.

The burden of proof is on a married woman to make out her right to property purchased in her name by her husband, when it is claimed by his creditors. *Stephens v. Follett*, 43 Fed. Rep. 842.

Fraudulent intent in taking a conveyance or incumbrance from a debtor is a question of fact, and must be proved to have actually existed. *Bridges v. Miles*, 152 Mass. 249.

The burden of proof is upon him who alleges an alteration in a writing after its execution, but it shifts from him to the adversary, if the writing, when produced, appears to have been altered in a substantially material manner. *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201.

The burden of proof is upon the holder of a negotiable instrument to show that an alteration therein was innocently made. *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, and *note*, 239.

The burden of showing the invalidity of a contract rests upon the party asserting it. Authorities cited in *Crawford v. Harlow*, 10 West. Rep. 78, 92 Mo. 498.

A note made and delivered is prima facie evidence of consideration. *Whitney v. Clary*, 5 New Eng. Rep. 152, 145 Mass. 156; *Bray v. Comer*, 82 Ala. 183; *Lipsmeier v. Vehslage*, 29 Fed. Rep. 175.

The burden of proving a purchase in good faith and for value devolves upon the defendant, after it is established that notes had surreptitiously been put in circulation. *Davis Sewing Mach. Co. v. Best*, 7 Cent. Rep. 63, 105 N. Y. 59.

The burden of proving the indorsement and delivery of a note by the maker, who is also the first indorser, to a second indorser, and its indorsement and delivery by the latter to indorsee, is on the indorsee, in an action by him against the maker. *Long Island Bank v. Boynton*, 7 Cent. Rep. 738, 105 N. Y. 656.

## CHAPTER VI.

### BEST AND SECONDARY EVIDENCE.

- § 93. *Exact Nature of the Rule Requiring the Best Evidence.*
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### § 93. **Exacting Nature of the Rule Requiring the Best Evidence.**

a. **The Rule without Practical Modifications.**—One dominant law of evidence that is without relaxation and at all times in

the ascendancy, is that demanding the best attainable evidence of which the case is susceptible. Bench, bar and commentator are alike agreed upon this postulate, and it is enforced with ruthless precision, both in this country and in England. The United States Supreme Court, through *Mr. Justice Nelson*, delineates the rule with admirable lucidity. In a case that is still quoted with approbation, and as a pertinent exposition of the subject under review, an excerpt from the opinion is inserted:

“One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically applies only to the distinction between primary and secondary evidence; but the reason assigned for the application, of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party’s possession or power; because the absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.” *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957.

On prior and on subsequent occasions the same court has announced a similar principle, and we may safely affirm that it is a cardinal feature of evidentiary law as administered in this country. No evidence shall be received, which presupposes better evidence in the party’s possession, and this rule may be regarded as established beyond question. *Taylor v. Riggs*, 26 U. S. 1 Pet. 591, 7 L. ed. 275; *Cooke v. Woodrow*, 9 U. S. 5 Cranch, 13, 3 L. ed. 22; *Fresh v. Gilson*, 41 U. S. 16 Pet. 327, 10 L. ed. 982; *DeLane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 409; *McPhaul v. Lapsley*, 87 U. S. 20 Wall. 264, 22 L. ed. 344.

The rule that the best evidence must be produced which the nature of the case admits, means not that the courts require the strongest possible assurance, but that no evidence shall be admitted which presupposes greater evidence in the party’s favor. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 8 L. ed. 424.

**b. Reason of the Rule.**—The reason of the rule that secondary or inferior evidence shall not be substituted for any evidence of a higher nature which the case admits of, is that the attempt to substitute the inferior for the higher implies that the higher would give a different aspect to the case of the party introducing the lesser. *United States v. Wood*, 39 U. S. 14 Pet. 430, 10 L. ed. 527; *Tayloe v. Riggs*, 26 U. S. 1 Pet. 591, 7 L. ed. 275; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957; *DeLane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 409.

The principle established in the federal court has been adopted with substantial unanimity throughout the state jurisdictions, as the following tabulation of authority will abundantly disclose.

The law only requires the highest proof of which the case is susceptible. What would amount to sufficient proof in one case, might be deemed insufficient in another. *Chicago, B. & Q. R. Co. v. Gregory*, 58 Ill. 272; *Booth v. Cook*, 20 Ill. 129.

Under this rule, it is not necessary to give the strongest possible assurance of a fact. Thus, to prove the plaintiff's demand satisfied, the defendant may prove the fact of payment, or the plaintiff's admission to that effect, though it should appear that the plaintiff had signed a receipt and it may be said that the receipt would be more satisfactory proof. *Southwick v. Hayden*, 7 Cow. 334.

A written proposition accepted with a parol modification is the best evidence of so much of the resulting contract as the writing contains, and it must be produced or its absence accounted for. *Ohio S. R. Co. v. Morey*, 7 L. R. A. 701, 47 Ohio St. 207; *Domestic S. Mach. Co. v. Anderson*, 23 Minn. 57.

**c. Further Illustration of the Rule.**—Analogous reasoning will require the rejection of parol evidence where the best evidence attainable is, for instance, a letter, statement or document, and its non-production is not accounted for, and no foundation is laid for the introduction of secondary evidence. *Mugge v. Adams*, 76 Tex. 448.

**d. Where Primary Evidence has been Lost or Destroyed.**—Where the best or primary evidence has been lost or destroyed, much latitude is allowed in the admission of parol evidence to supply the omission, and although such latitude may have been carried to its extreme limits, a new trial will not be granted where the finding was substantially right upon the evidence. *McCullough v. Davis*, 6 West. Rep. 579, 108 Ind. 292.

The best evidence of which the nature of the question admits may be received, but not always the best evidence of which the exigencies of the particular case admit; and the inability of the party through accident or misfortune to adduce legal evidence does not authorize the admission of illegal evidence. *Comer v. Hart*, 79 Ala. 389.

In an action seeking to establish a partnership between the parties, evidence of a bookkeeper to the effect that there is no entry in the books of the alleged firm indicating that plaintiff was a partner was held inadmissible as being the mere opinion of the bookkeeper, the books themselves being the best evidence. *McCall v. Moschcowitz*, 10 N. Y. Civ. Proc. Rep. 107-127.

**e. The Cardinal Consideration Stated.**—The accurate and thorough presentation of the facts is essential to the due administration of justice. This cardinal consideration is doubtless responsible for the singular unanimity that pervades all jurisdictions regarding the enforcement of the evidentiary rule, which declares: "The best evidence of which the case is susceptible must be produced." *Morton v. White*, 16 Me. 53; *Putnam v. Goodall*, 31 N. H. 419; *Greeley v. Quimby*, 22 N. H. 335; *Wells v. Jackson Iron Mfg. Co.* 48 N. H. 491; *Com. v. Kinison*, 4 Mass. 646; *Bassett v. Marshall*, 9 Mass. 312; *Holliday v. Harvey*, 39 Tex. 670. And so when a document is voluntarily destroyed by the party. See *Cotton v. Campbell*, 3 Tex. 493; *Bovee v. McLean*, 24 Wis. 225; *Teegarden v. Caledonia*, 50 Wis. 292; *Lewis v. Hudmon*, 56 Ala. 186; *Isabella v. Pecot*, 2 La. Ann. 387; *Hall v. Acklen*, 9 La. Ann. 219; *Pendery v. New Orleans Cres. Mut. Ins. Co.* 21 La. Ann. 410; *Ritchie v. Kinney*, 46 Mo. 298; *Chicago v. McGraw*, 75 Ill. 566; *Gimbel v. Hufford*, 46 Ind. 126; *State v. Howe*, 64 Ind. 18; *Mason v. Fractional School Dist. No. 1*, 34 Mich. 228; *Conger v. Converse*, 9 Iowa, 554; *Steele v. Etheridge*, 15 Minn. 501; *Bemis v. Becker*, 1 Kan. 226; *Dwyer v. Dunbar*, 72 U. S. 5 Wall. 318, 18 L. ed. 489; *Comstock v. Carnley*, 4 Blatchf. 58; *Boucicault v. Fox*, 5 Blatchf. 87; *Fitzgerald v. Adams*, 9 Ga. 471; *Cloud v. Patterson*, 1 Stew. (Ala.) 394; *State v. Thompson*, 79 Iowa, 703. So proof of the loss of a telegram is a prerequisite to the admission of secondary evidence of its contents. *American U. Teleg. Co. v. Daughtry*, 89 Ala. 191.

The rule requiring the production of the best evidence of which the case in its nature is susceptible is adopted for the prevention of fraud, and is essential to the administration of jus-

tice. *Anglo-American Pack. & P. Co. v. Cannon*, 31 Fed. Rep. 313.

The law does not presume or require impossibilities; it only demands and requires the best proof under the circumstances of each case. *St. Louis, K. & A. R. Co. v. Chapman*, 38 Kan. 307.

A certified copy of a sheriff's deed is primary evidence and is admissible without accounting for the original. *Hammond v. Gordon*, 11 West. Rep. 904, 93 Mo. 223.

An exception to the rule regarding best and secondary evidence is that the official character of an alleged public officer need not be proved by his commission, or by other written evidence of his right to act as such, except in an issue directly between the officer and the public. *Woodson v. State*, 24 Tex. App. 153.

The fact of an agency cannot be proved by parol while the written evidence of it exists. Authorities cited in *DeBaril v. Campoy y Pardo* (Pa.) 7 Cent. Rep. 642, 643.

A written telegraph message delivered to the receiver thereof is the primary and best evidence of its contents, as between the sender and receiver, when there is no proof of mistake and the sender has taken the initiative, making the telegraph company his agent for the transmission. *Anheuser-Busch Brew. Asso. v. Hutmacher*, 4 L. R. A. 575, 29 Ill. App. 316.

**f. Rule does not Require the Greatest Amount of Evidence.**—The rule under consideration does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when better evidence is withheld, it is only fair to presume that the party has some sinister motives for not producing it, and that, if offered, his design would be frustrated. Best, *Ch. J.*, in *Strother v. Barr*, 5 Bing. 151; Holroyd, *J.*, in *Brewster v. Sewell*, 3 Barn. & Ald. 302; Jervis, *Ch. J.*, in *Twyman v. Knowles*, 13 C. B. 224; *C'vifton v. United States*, 45 U. S. 4 How. 247, 248, 11 L. ed. 959, 960, Nelson, *J.* This rule becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable. 1 Phil. Ev. 418; 1 Story, Ev. 500; Glassf. Ev. 266—

278; *Tayloe v. Riggs*, 26 U. S. 1 Pet. 591, 596, 7 L. ed. 275, 277; *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 367, 8 L. ed. 424, 430; *Minor v. Tillotson*, 32 U. S. 7 Pet. 100, 101, 8 L. ed. 622.

A further incumbrance of the text, by additional citation is quite unnecessary. The rule is emphasized in so many ways and is sustained by such eminent authority that it may well be regarded as one of the few postulates of the law to which bench, bar and commentator yield explicit assent. *Crane v. Andrews*, 6 Colo. 353; *Greeley v. Quimby*, 22 N. H. 335; *Morton v. White*, 16 Me. 53; *Cotton v. Campbell*, 3 Tex. 493; *Sloan Saw Mill & L. Co. v. Guttshall*, 3 Colo. 8; *Newsom v. Jackson*, 26 Ga. 241; *Hoitt v. Moulton*, 21 N. H. 586; *The Queen's Case*, 2 Brod. & B. 287; *Union Bank v. Ellis*, 3 La. Ann. 188.

**g. Modifications of the Rule.**—The universality of the rule requiring the best evidence is doubtless the prime reason for the exceptions we find under it. It would be impossible to formulate a universal rule unyielding and Rhadamanthine to which the emergencies of actual trial had not demonstrated the necessity of an exception. The one under review is peculiarly susceptible to this theory, and has five well recognized exceptions.

**1. Public Character of Officers.**—A public officer in the continuous and notorious discharge of his duty is presumed to be in the due exercise of his delegated functions. The presumption arises from the exercise of his official duty that his election or appointment is valid. Public convenience requires a relaxation of the rule, and official character is assumed—official acts are recognized and sanctioned without requiring in all instances a certificate of their appointment or election, although this would be the best evidence of the fact. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 8 L. ed. 424; *Fowler v. Beebe*, 9 Mass. 231; *Wilcox v. Smith*, 5 Wend. 231.

**2. Public Records or Registers.**—Great embarrassment is avoided by the rule which allows an exception to the best evidence, in so far as public records or registers are concerned. It is in general sufficient to produce an exemplified or examined copy and for an exhaustive review of the authorities on this point, see *post*, Chap. VII., title *Public Documents and Judicial Records*, §§ 126 and 140.

**3. Transcripts from Justices' Dockets.**—By statutory provision in the various States of the Union the docket book of a



justice of the peace is not absolutely required in evidence, although, of course, it would constitute the best evidence obtainable. Public convenience requires a less stringent rule, and these various statutes provide that a transcript of such document duly certified by him is evidence before him of any matter required by law to be entered by him therein. Further, the statutes usually allow a transcript from the docket book of a justice of the peace, when properly authenticated, as competent evidence wherever required, and, indeed, any question before a justice may, in case of his death or absence, be proved by the original minutes ingrossed by him, pursuant to law, in his docket book. N. Y. Code Civ. Proc. § 978; Ill. Rev. Stat. 490, § 17; Colo. Rev. Stat. chap. 30, § 2; Colo. Stat. 1883, chap. 36, § 2; Cal. Code, Civ. Proc. §§ 19, 20, *et seq.*

**4. Where Primary Evidence is in the Hands of Adverse Party.**—Where the primary evidence is in the hands of an adverse party and notice to produce has been duly served upon him, of which notice no attention is paid, secondary evidence of its contents is admissible, and the rule regarding the production of the best evidence is relaxed or disregarded. This subject is accorded an extended treatment in Section 96, *post*. It should be remembered in this connection, however, when it is shown that a paper is lost, without the fault of the party losing it, he may give parol evidence of its contents. *Read v. Brookman*, 3 T. R. 151; *New York Car Oil Co. v. Richmond*, 6 Bosw. 213.

The mere fact that a party has voluntarily destroyed a paper will not preclude him from giving secondary evidence of its contents if the circumstances of its destruction are consistent with an honest purpose (*Rudolph v. Lane*, 57 Ind. 115); but before he can offer secondary evidence of its contents he must repel every inference of fraudulent design in its destruction. *Blake v. Fash*, 44 Ill. 302; "*The Count Joannes*" v. *Bennett*, 5 Allen, 169. See *Bagley v. McMickle*, 9 Cal. 430.

Even where an instrument is notoriously without the State, there must still be preliminary proof of reasonable effort to produce it before parol evidence of its contents is allowed. *Shaw v. Mason*, 10 Kan. 183; *Carland v. Cunningham*, 37 Pa. 228; *Wood v. Cullen*, 13 Minn. 394.

Parol evidence may be given of the contents of a letter, after it is proved to be in the hands of the defendant, and that he has refused to produce it, after the service of a proper notice on him

for that purpose. *Sheldon v. Wood*, 2 Bosw. 269. So when a paper was made out in duplicate, and it is shown that one of the originals is lost, and the other is in the possession of a party on trial for an offense, a copy of the paper may be given in evidence, as there is no power in the court to compel the accused to produce the paper as evidence against himself. *State v. Gurnee*, 14 Kan. 111.

The service of a notice on a party requiring him to produce a paper does not compel him to produce it, like the service of a *subpoena duces tecum*; the only effect of the notice is to permit the introduction of parol evidence as to the contents of the paper in cases in which due notice has been given to produce it, and a refusal to do so. *Edmonstone v. Hartshorn*, 19 N. Y. 9.

### 5. Written Stipulations or Agreements between Parties.

—Lastly, as an exception to the rule requiring the best evidence, the authorities hold, that when the written stipulations or agreements between the parties are collateral to the question in issue, they need not be produced (*Wabash & E. Canal Trustees v. Reinhart*, 22 Ind. 463); as, where a payment of money is proved by oral evidence, although a written receipt was taken at the time, and an oral demand of goods may be proved, although a written demand was made at the same time. *Wolf v. Foster*, 13 Kan. 116; *Shields v. Stark*, 14 Ga. 429.

On this principle the payment of contracts and of judgments docketed may be proved by oral testimony, although there may be authentic record evidence of the fact. *Keene v. Meade*, 28 U. S. 3 Pet. 7, 7 L. ed. 583; *Planters' & M. Bank v. Borland*, 5 Ala. 531; *Kingsbury v. Moses*, 45 N. H. 222; *Page v. Einstein*, 7 Jones, L. 147.

Such evidence is admissible to establish the fact of payment, but not to show that a receipt was given, or that an indorsement of the amount was made upon a note or upon an execution. *French v. Frazier*, 7 J. J. Marsh. 425. So the payment of taxes may be shown by parol, and the production of the record is not necessary. *Davis v. Hare*, 32 Ark. 386; *Dennett v. Crocker*, 8 Me. 239; *Adams v. Beale*, 19 Iowa, 61.

### § 94. Blending of the Subject with Secondary Evidence.—

*Sir James Stephen* in a more ambitious attempt at tabulation indicates nine exceptions. Without further reference to these in this connection, it might be stated that as this subject naturally

merges into the succeeding one of secondary evidence, it is considered appropriate to reserve further discussion of these subdivisions.

§ 95. **What Party must Show in order to Introduce Secondary Evidence.**—An undeviating rule that is enforced with the utmost rigidity is one that requires the party offering secondary evidence to sustain a contention or an averment, to satisfactorily account for the non-production of the primary or best evidence. This rule has received recent and emphatic vindication from *Ch. J. Bleckley*, of the Georgia Supreme Court. We excerpt from the opinion, the opening sentence of which is unique: "The record is such a medley and mass of stuff that it is impossible to tell in any reasonable time how many errors are covered up in it. \* \* \* It was not error to admit parol evidence of the contents of the alleged bond for titles from Vanzant to Strickland, the bond being relied upon in the abstract of title, and its non-production not being sufficiently accounted for. If it was in existence and accessible to the party wanting to use it, it should have been produced. If it was lost or destroyed, the fact of its loss or destruction should have been proved as a necessary preliminary to proving its contents by other evidence." *Georgia Pac R. Co. v. Strickland*, 80 Ga. 776, 12 Am. St. Rep. 282.

a. **Due Diligence Required in order to Command Best Evidence.**—Due diligence is in all instances required in order that the court may command in the elucidation of the controversy the best avenues of evidence that the case admits. Hence, secondary evidence of the contents of a written instrument is inadmissible, in the absence of proper diligence to secure the original. *Low v. Tandy*, 70 Tex. 746.

The Illinois Supreme Court disincumbers itself from all embarrassment on this subject by endorsing the well-settled rule. In all instances a sufficient foundation by way of preliminary proceedings must be made before the introduction of secondary evidence. *Berdel v. Egan*, 125 Ill. 298.

When the recitals of a document become material, under the aspect of the case as presented by the pleadings, secondary evidence of the contents of that document cannot be admitted, until a sufficient predicate has been laid. *Trammell v. Hudmon*, 86 Ala. 472.

b. **Foundation Must be Satisfactory.**—The universality of the

rule requiring the best evidence has already been discussed, and, as we have shown, no principle of the law of evidence has been more thoroughly embedded in the juridical mind, than this well-recognized and salutary rule. But it frequently occurs, in the actual experience of all litigation, that best or primary evidence is not attainable; that the parties who are for the time being the repositories of definite knowledge respecting a controverted fact are beyond the jurisdiction and influence of the court, or are equally unavailing for the purposes of a deposition. Obviously, in view of such emergencies, resort must be had to other methods of eliciting the truth, and hence, from a very early period, courts have adjusted evidentiary regulations in order to better meet the evasive character of direct testimony, and prevent a substantial failure of justice.

**c. Negative Definition of This Term.**—A negative definition of secondary evidence is: All evidence falling short of the best or primary evidence.

Secondary evidence means, according to *Sir James Stephen*,—

I. Examined copies, exemplifications, office copies and certified copies;

II. Other copies made from the original and proved to be correct;

III. Counterparts of documents as against the parties who did not execute them;

IV. Oral accounts of the contents of a document given by some person who has himself seen it. *Dig. Ev.* § 70.

The cases which most frequently call for the application of the rule now under consideration are those which relate to the substitution of oral for written evidence; and they may be arranged in three classes, including in the first class those instruments which the law requires should be in writing; in the second those contracts which the parties have put in writing; and in the third all other writings, the existence of which is disputed, and which are material to the issue. *Greenl. Ev.* § 85.

The precise import of this rule regarding secondary evidence is best apprehended by a careful consideration of the principles which underlie its application in actual practice. Until it is shown that the production of primary evidence is out of the party's power, no other proof of the fact is generally admitted. All evidence falling short of this in its degree is termed secondary. The question whether evidence is primary or secondary has reference to

the nature of the case in the abstract, and not to the peculiar circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law, and not of fact, referring only to the quality, and not to the strength of the proof. Evidence, which carries on its face no indication that better remains behind, is not secondary but primary. Taylor, Ev. § 494.

Primary evidence is the best evidence, or that kind of evidence which affords the greatest possible certainty of the fact in question. Haines' Treatise (12th ed. 1887) 647.

**d. Secondary Evidence must be the Best Attainable.**—The principle established by the United States Supreme Court, as to secondary evidence, is that it must be the best the party has it in his power to produce, and the rule is to be so applied as to promote the ends of justice and guard against fraud, surprise and imposition. *Renner v. Bank of Columbia*, 22 U. S. 9 Wheat. 597, 6 L. ed. 170; 1 Greenl. Ev. § 84 and *note*. This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence. *Doe v. Ross*, 7 Mees. & W. 106; *Nash v. Williams*, 87 U. S. 20 Wall. 226, 22 L. ed. 254.

**e. The Rule Allowed is One of Policy and Convenience.**—The admission of secondary evidence in modern practice and under the fostering protection of the courts is regarded as a rule of policy, but grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree. Bouv. Law Dict. Title, *Evidence*. The present rule is satisfied by the production of the best attainable evidence. In requiring the best evidence applicable to each particular fact, it means that no evidence of a nature merely substitutionary shall be received where the primary evidence is producible. By substitutionary evidence is meant such evidence as implies the existence of primary or more original information. 3 Wait, Law and Pr. (5th ed. 1888) 441.

**f. Extended Statement of the English Rule.**—The general rules regulating the introduction of secondary evidence are administered with reasonable uniformity throughout the various jurisdictions. The basic principles of all these rules are found in

the early English decisions and the substance of juridical comment upon the topic has found its best expression from *Mr. Justice Stephen*, in his well known Digest. While the rule there formulated is primarily adjusted to the textual requirements of the English statutory laws regulating the subject, still the wide acceptance of the principle it emphasizes commends it to the attention of the bench and bar without regard to locality and is our warrant for its reproduction in this connection, as imparting additional value to this review. The language of the sections in question, is as follows:

“Secondary evidence may be given of the contents of a document in the following cases:

“(a) When the original is shown or appears to be in the possession or power of the adverse party, and when, after the notice mentioned in article 72, he does not produce it.

“(b) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpoena duces tecum*, or after having admitted that it is in court;

“(c) When the original has been destroyed or lost, and proper search has been made for it;

“(d) When the original is of such a nature as not to be easily movable, or is in a country from which it is not permitted to be removed;

“(e) When the original is a public document;

“(f) When the party has been deprived of the original by fraud, so that it cannot be procured;

“(g) When the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being; or

“(h) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection; provided that that result is capable of being ascertained by calculation.

“Subject to the provisions hereinafter contained, any secondary evidence of a document is admissible.

“In case (h) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

“Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided

by the judge, unless in deciding such a question the judge would in effect decide the matter in issue." Dig. Ev. art. 71.

In a recent edition of Stephen's Digest by Chase in a note appended to the article above quoted it appears as the English doctrine that there are no degrees in secondary evidence, and a party may introduce any form thereof (*e. g.*, parol testimony instead of a copy), if the original cannot be had. Some American States adopt the same doctrine (*Goodrich v. Weston*, 102 Mass. 362; *Eslow v. Mitchell*, 26 Mich. 500; *Carpenter v. Dame*, 10 Ind. 125); but generally in this country a party must produce the best form of secondary evidence that is or appears to be procurable by him. *Nash v. Williams*, 87 U. S. 20 Wall. 226, 22 L. ed. 254; *Reddington v. Gilman*, 1 Bosw. 235; *Niskayuna Overseers of Poor v. Albany Overseers of Poor*, 2 Cow. 537; *Stevenson v. Hoy*, 43 Pa. 191; *Illinois Land & L. Co. v. Bonner*, 75 Ill. 315; *Harvey v. Thorpe*, 28 Ala. 250; *Higgins v. Reed*, 8 Iowa, 298; *Nason v. Jordan*, 62 Me. 480. But see, as to New York, *Van Dyne v. Thayre*, 19 Wend. 166.

g. **Scope of the Rule.**—All that is contended for the present rule is that the parties litigant be required to produce the best attainable evidence. All of the complexities that infest the law of evidence, have been devised with greater or less sagacity by the best judicial acumen of the time, with a view to elicit the merits and equities surrounding a legal dispute. The rules of the entire science are absolutely abortive if this result is not attained. Conspicuously is reproach brought upon the science of the law when it requires and exacts the use of methods incompatible with reason, and in many instances entirely unattainable. This view is epitomized in the familiar maxim "the law does not require a vain thing." Secondary evidence then, may be regarded as a necessity imposed upon all parties in court, by the mere force of the limitations nature has placed upon human activities. It may be resorted to as we have seen, in all instances, where the primary evidence is beyond control, or where in some instances public convenience exacts it.

h. **Frequent Application of the Rule.**—One familiar and important application of the doctrine arises from those cases in which secondary evidence is given of the contents of a document. These cases arise in instances referred to by *Mr. Justice* Stephen in art. 71 of his Digest.

**i. The Rule as Stated by the United States Supreme Court.**—The rule governing this topic has been recently stated by the Supreme Court of the United States in the following language: “The general rule of evidence is, if a party intend to use a deed or any other instrument in evidence, he ought to produce the original if he has it in his possession; or, if the original is lost or destroyed, secondary evidence, which is the best the nature of the case allows, will in that case be admitted. The party, after proving any of these circumstances to account for the absence of the original, may read a counterpart; or, if there is no counterpart, an examined copy; or, if there should not be an examined copy, he may give parol evidence of its contents.” *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641. *Mr. Justice Woods*, in the course of the above opinion, cites with approval the case of *Riggs v. Tayloe*, 22 U. S. 9 Wheat. 486, 6 L. ed. 141. The attitude of the United States Supreme Court has been one of consistent indulgence to the views above expressed.

**j. Rule where Primary Evidence is Lost.**—If the original paper be lost or destroyed, secondary evidence of its contents will be admitted. *Sebree v. Dorr*, 22 U. S. 9 Wheat. 558, 6 L. ed. 160; *Riggs v. Tayloe*, 22 U. S. 9 Wheat. 483, 6 L. ed. 140; *DeLane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 409; *United States v. Doeblen*, *Baldw.* 519.

So where the paper is in possession of the opposite party, if notice to produce be given, and it be not produced at the trial, inferior evidence of its contents may be given. *Bas v. Steele*, 3 Wash. C. C. 381; *Hanson v. Eustace*, 43 U. S. 2 How. 653, 11 L. ed. 416; *United States v. Winchester*, 2 McLean, 135.

The contents of a written instrument cannot be proved by parol, unless the originals have been lost or destroyed, or their non-production is in some way accounted for. *Wilson v. Young*, 2 Cranch, C. C. 33; *United States v. Lynn*, 2 Cranch, C. C. 309; *Hutchinson v. Peyton*, 2 Cranch, C. C. 365; *Patriotic Bank v. Coote*, 3 Cranch, C. C. 169; *Halderman v. Halderman*, *Hempst.* 559; *United States v. Wary*, 1 Cranch, C. C. 312; *United States v. Long*, 1 Cranch, C. C. 373; *United States v. Chenault*, 2 Cranch, C. C. 70; *Ransdale v. Grove*, 4 McLean, 282.

The rule applies to criminal as well as civil suits. *United States v. Reyburn*, 31 U. S. 6 Pet. 352, 4 L. ed. 824; *United States v. Carrico*, 2 Cranch, C. C. 110; *United States v. Winchester*, 2 McLean, 135.



The party offering secondary evidence must show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. *Simpson v. Dall*, 70 U. S. 3 Wall. 460, 18 L. ed. 265.

As to the degree of search necessary, see *Hotchkiss v. Mosher*, 48 N. Y. 478; *Simpson v. Dall*, 70 U. S. 3 Wall. 460, 18 L. ed. 265; *DeLane v. Moore*, 55 U. S. 14 How. 253, 14 L. ed. 409; *Minor v. Tillotson*, 32 U. S. 7 Pet. 99, 8 L. ed. 621; *Republic F. Ins. Co. v. Weide*, 81 U. S. 14 Wall. 375, 20 L. ed. 894.

The rigor with which this distinguished court has maintained the principles applicable to secondary evidence has naturally diffused itself throughout subordinate jurisdictions, and the decisions of the various state tribunals imply a cordial acquiescence in both the force and efficacy of the doctrine as above outlined. Thus, the Supreme Court of Georgia has held, in a very recent case (1888), that secondary evidence is not admissible until non-production of the primary evidence has been sufficiently accounted for. *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776.

**k. Degree of Diligence Necessary to be Shown in Effort to Produce Primary Evidence.**—Secondary evidence of the contents of a written instrument is inadmissible in the absence of proper diligence to secure the original. *Low v. Tandy*, 70 Tex. 746. When the terms of a written instrument are material in one of the aspects presented by the pleadings, though immaterial in other aspects, secondary evidence of its contents cannot be admitted until a sufficient predicate has been laid. *Trammell v. Hudmon*, 86 Ala. 472. But see *Nye v. Gribble*, 70 Tex. 458. It is error to admit a record copy of a deed, when the deed itself is in possession or under control of him who seeks to admit the record thereof. *West v. Cameron*, 39 Kan. 736. Sufficient foundation, by way of preliminary proceedings, must be made before the introduction of secondary evidence of the contents of a deed. *Berdel v. Egan*, 125 Ill. 298.

**§ 96. Preliminaries Necessary for the Introduction of Secondary Proof.**—A party wishing to avail himself of secondary evidence is very justly required to observe certain preliminaries, which are absolutely essential to the exercise of this right or the introduction of this grade of testimony in those cases where the primary evidence is attainable, but is in the possession

or under the control of the adverse party. In such instances, by serving due notice to produce the document, letter or statement required, and on its further appearing that such a notice has been neglected or ignored by the party served, then and in that event the contents of the instrument sought to be shown in evidence can be proved by secondary evidence. *Chief Judge Folger* in a comparatively recent case in which the defendant had notice, but refused to produce the document called for, held that by that refusal he had incurred the penalty of having all inference from the proof taken most strongly against him, and that secondary evidence of the contents of the document was admissible. *Cohen v. Continental L. Ins. Co.* 69 N. Y. 300 (1877).

a. **Notice to Produce; Mode of Service.**—The rules regulating the service of this notice, the phraseology employed, the length of time given, the manner of the service and the proof of it, more closely affiliate with questions of practice than with the nature and scope of this work. However, as questions of this nature are of frequent importance, and are so closely allied with an important branch of the law of evidence, we append art. 2, chap. 25, of Rumsey's Practice, the exceptional ability of the author and the very recent appearance of his work being guarantees of the controlling nature of the law he cites:

"In general, notice to produce the original upon the trial should be given before secondary evidence of a document is admissible; even where a party denies that he has a particular paper, or that it ever existed, such denial has been held not to dispense with the necessity of a notice to produce it. *Grimm v. Hamel*, 2 Hilt. 434. Where a document intended to be offered in evidence is in the possession or within the control of the adverse party, he must be served with a notice to produce it upon the trial, and if such notice be not served, parol evidence of its contents is admissible (*Rogers v. Van Hoesen*, 12 Johns. 221); but if the party, in his pleading, allege that the adverse party has possession of the document, no other notice to produce is requisite; the pleading will be considered a sufficient notice (*Hardin v. Kretzinger*, 17 Johns. 293; *Forward v. Harris*, 30 Barb. 338); and where a party obtains possession of a part or all of a document by force (*Scott v. Pentz*, 5 Sandf. 572), or by fraud (*Leeds v. Cook*, 4 Esp. 256), the adverse party may give proof of its contents without notice. When instruments are executed in duplicate, both being originals, no notice to produce is required, as the

counterpart of an agreement executed between the parties may be read by either party without notice to the other to produce. *Burleigh v. Stibbs*, 5 T. R. 465. The contents of any paper or notice in the action may be proved without notice to produce; as the notice of dishonor in an action against an indorser (*Paton v. Lent*, 4 Duer, 231); or a notice to repair, in an action to recover a portion of the expenses of erecting a division fence put up by plaintiff after such notice. *Willoughby v. Carleton*, 9 Johns. 136."

**b. What Notice Should Contain.**—"The notice should, after the title of the cause, contain a particular description of the books or papers required to be produced; and it is usual at the end of the notice to require the production of all other documents, books, letters, papers and writings whatsoever, in the control of the party, containing any entry, memorandum or other matter, in any wise relating to the matters in question in the case. When notice is required, it must distinctly point out the paper required and also state that, in the default of producing it, parol evidence of its contents will be given on the trial. *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 124. The notice should be as explicit as possible; and where it is to produce copies of the books of a foreign corporation, it must specify briefly the nature of the evidence proposed to be given. The fact that a notice is entitled in the wrong court, if it does not mislead the party, is not material; it will still be considered a sufficient notice. *Lawrence v. Clark*, 14 Mees. & W. 250. The notice need not be served a second time, although the action is not tried during the term at which the notice is given; it remains good for every succeeding term (*Jackson v. Shearman*, 6 Johns. 19); and a notice given for the first trial is sufficient for a second trial. *Hope v. Beadon*, 17 Q. B. 509. The notice to produce a copy of the books of a foreign corporation must be served at least ten days before the day appointed for the trial. In other cases only a reasonable notice is required to be given, and what is a reasonable notice will depend upon the circumstances of each particular case. *Utica Ins. Co. v. Cadwell*, 3 Wend. 300. If the document is at a distance notice must be given a sufficient time before the paper or document is wanted to enable the party or attorney to go or send for it, and return before the case can possibly come on for trial (*Id.*); but if the document is in court or near by, the notice is sufficient even though served after the trial has commenced. *M'Pherson v. Rathbone*, 7 Wend. 216. The notice

may be served on the party or his attorney, and by a party or his attorney or a third person who is competent to make affidavit of such service."

**c. Effect of Notice.**—"The effect of the notice is to render secondary proof of the contents admissible, in the event that the document is not produced; and if the party called on to produce refuses to produce the document required, and secondary evidence is introduced, if vague or uncertain, every presumption shall be against a party refusing to produce, who might by producing such paper have removed all doubt. *Life & F. Ins. Co. v. Mechanics F. Ins. Co.* 7 Wend. 31. But the refusal of itself is not evidence of any fact. *Cooper v. Gibbons*, 3 Campb. 363. The mere fact of calling for a document does not have the effect of making it competent evidence; nor is a party obliged to introduce a paper simply because he has required its production; he may refuse to put it in evidence, at his option. *Kenny v. Clarkson*, 1 Johns. 385. Before a party can avail himself of the right to introduce secondary evidence on the refusal to produce a document, he must show that the party has the document under his control, or could produce it; as a party is not required to do an impossible thing, nor by his refusal or failure can he be prejudiced. Before the notice will have the effect above stated there must be proof by the affidavit of the party serving such notice, stating the time and manner of such service and upon whom it was served; and it will then be for the court to determine whether the notice and its service are sufficient."

§ 97. **Another Theory of This Grade of Evidence.**—The theory on which evidence of a secondary grade is admitted is that the production of the primary evidence is out of the party's power. The loss or destruction of a paper is the occasion on which this rule is most frequently invoked; yet in the practical application of the rule to lost papers, proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original is not required. It is not necessary to prove exhaustively, that the paper nowhere exists. The question is always one of diligence in the effort to procure the original, before evidence of its contents is resorted to. As a general rule, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to

him. 1 Taylor, Ev. § 399; *Simpson v. Dall*, 70 U. S. 3 Wall. 460, 18 L. ed. 265. If any suspicion hangs over the instrument, or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reasons for its non-production; but where there is no suspicion, all that ought to be required is reasonable diligence in the efforts to obtain the original. *Minor v. Tillotson*, 32 U. S. 7 Pet. 99, 8 L. ed. 621. Reasonable search is sufficient, although it does not appear that every possible search has been made. *Hart v. Hart*, 1 Hare, 1; *M'Gahey v. Alston*, 2 Mees. & W. 206-214.

§ 98. **No Absolute Rule as to the Extent of Search.**—No absolute rule has been or can be laid down, defining what search shall be considered as a search prosecuted with reasonable diligence. The degree of diligence which shall be considered necessary, in any case, will depend on the circumstances of the particular case, the character and importance of the paper, the purposes for which it is proposed to use it, and the place where a paper of that kind may naturally be supposed to be likely to be found.

§ 99. **Value of a Missing Paper a Circumstance to be Considered.**—The value of a paper is a circumstance entering into the degree of diligence required. If the document be an important one, such as that the owner would have an interest in preserving it, diligent search will be required; but if the paper be of little or no value, a presumption of its loss or destruction will arise from that circumstance, and a slight degree of diligence may satisfy the court of the party's inability to produce it. 1 Taylor, Ev. § 399. A greater degree of diligence would be expected in the search for an important paper, such as a deed or a subsisting agreement, than would be required in the effort to procure a paper of comparatively little importance, which there would be no special interest in preserving, such as a letter, or an envelope, or a satisfied agreement, or an expired lease or indenture of apprenticeship.

§ 100. **Character of the Paper.**—The character of the paper will also influence greatly the determination of the place where, or the person with whom, the search should be made. As was said by Lord Ellenborough in *King v. Morton*, 4 Maule & S. 48: "The making search and using due diligence are terms applicable to some known or probable place or person, in respect of which diligence may be used." "If," says Chancellor Greene, "the person to whom the paper belongs, or who, by law, has the

custody of it, or to whom it has been intrusted by another, testifies that he has made diligent search for it, where it was likely to be found, it is sufficient evidence of its loss." *Clark v. Hornbeck*, 17 N. J. Eq. 430. "The first inquiry," says Blackburn, J., "is, Where would the document naturally be, if it be still in existence? For there the search should be made, and if not found, then secondary evidence will be admissible." *Reg. v. Hinckley*, 3 Best & S. 585.

If the document be a private paper, in which the party offering secondary evidence of its contents has a personal interest, and it be an important paper, such as, in the usual course of business, would be likely to be in his possession, or in the possession of another for his benefit,—as, for instance, articles of agreement to which he is a party,—pursuit of it in every direction in which the original can be traced may reasonably be required, before secondary evidence of its contents may be received. *Smith v. Axtell*, 1 N. J. Eq. 494. If the document be one in which other persons are interested, which has been placed in the hands of a custodian, for safe keeping, the latter must be required to make search, and the fruitlessness of his search be shown, before secondary evidence can be let in. 1 Whart. Ev. § 144; *Hart v. Hart*, 1 Hare, 8. If the paper be one of importance chiefly to third persons, search among the papers of such of the parties as would have an interest in the preservation of the paper, or would, under the circumstances, be likely to have it in possession, will be sufficient. *Reg. v. Hinckley*, *supra*; *Minor v. Tillotson*, 32 U. S. 7 Pet. 99, 8 L. ed. 621; *Kingwood Overseers of Poor v. Bethlehem*, 13 N. J. L. 221.

### § 101. Search Must be Made in Ordinary Place of Deposit.

—If the paper be one of a kind that in the usual course of business would have a proper place of deposit, search in that place is all that would be required, and, in the absence of grounds of suspicion that the original has been fraudulently withheld, will justify the admission of secondary evidence without calling persons who have had access to the paper, and possibly might have the original in their possession. 1 Taylor, Ev. § 401; *Johnson v. Arnwine*, 42 N. J. L. 451, 36 Am. Rep. 527.

The close relations that this branch of our topic sustains to the practice methods now in vogue by which primary evidence is dispensed with upon proof of the due service on the party having it in his possession of a notice to produce is sufficient warrant in this

connection for a brief diversion to the end that the introduction of secondary evidence may be better understood, and an illustration afforded of the method usually employed in actual practice by which this grade of evidence is presented for judicial consideration. Before a party can avail himself of the right to introduce secondary evidence on the refusal to produce a document, he must show that the party has the document in his control or could produce it; as a party is not required to do an impossible thing, nor by his refusal or failure can he be prejudiced. Before the notice will have the effect above stated there must be proof by the affidavit of the party serving such notice, stating the time and manner of such service and upon whom it was served; and it will then be for the court to determine whether the notice and its service are sufficient. See 2 Rumsey, Pr. (ed. 1888) 95.

§ 102. **Secondary Evidence of Articles in Their Nature Immovable.**—There are instances where, in the very nature of the case, secondary evidence is allowed to prevent a complete prostration of justice, and award to a meritorious litigant the equity he demands. There is reposed in the trial court a certain margin of discretion, and, on the familiar principle that a discretionary order is not appealable, the exercise of this discretion on the part of the trial court frequently results in a more perfect administration of justice than could be expected were our courts hampered and bound to any arbitrary system regarding the admission of evidence. It is seldom, indeed, that an appellate court is called on to review, either the propriety or the justice of an order resting originally in the discretion of the court. It is only where the most gross and wanton prostitution of this discretionary power is shown—where the invasion of a public or private right is palpable and unmistakable—that an order of this description will be inquired into and reversed. Hence it is that in all jurisdictions this margin of discretion vested in the trial court or presiding judge is of great efficacy in determining the rights of any parties to a controversy respecting the admission of evidence.

a. **Relaxation of the Rule in Some Cases.**—In harmony with the well-settled principles of equity, the law of evidence allows the introduction of secondary proof, where it is necessary to show the nature and character of inscriptions on walls and fixed tables, mural monuments, grave stones, notices affixed to boards, or wherever they are inscribed upon any immovable substance, in

such a way as to interfere with their production in court. In such cases the primary evidence is possible, perhaps, but is attended with such manifest inconvenience to all concerned, that the law dispenses with it, merely in the interest of time, expediency and common sense.

The English decisions hold that, in the case of mural inscriptions, their value as evidence depends almost entirely upon the authority under which they were made, and the distance of time between their erection and the event they commemorate. *Atheney Peerage*, Pr. Min. of Ev. 45. And the ease with which such evidence can be manufactured renders the strictest scrutiny necessary to prevent imposition, and it should be remembered that in the case of notices affixed to walls, etc., it must appear that the document was affixed to the freehold and could not easily be removed, and if it is shown to have merely been affixed to the walls of a building by nail or other contrivance to hold it in place, notice to produce it must be given before secondary evidence of its contents can be received. *Jones v. Tarleton*, 9 Mees. & W. 675.

**b. Best's Theory in Cases of This Description.**—There are several exceptions to the rule which requires primary evidence to be given, notably the following: *First*, where the production of it is physically impossible, as where characters are traced on a rock; or, *secondly*, where it would be highly inconvenient on physical grounds, as where they are engraven on a tombstone (*Tracy Peerage Case*, 10 Clark & F. 154), or chalked on a wall or building (*Mortimer v. M'Callan*, 6 Mees. & W. 58, 63, 68; *Sayer v. Glossop*, 2 Exch. 411, *per Rolfe*, V.; *Bruce v. Nicolopulo*, 11 Exch. 129), or contained in a paper permanently fixed to it. *Rex v. Fursey*, 6 Car. & P. 84; *Jones v. Tarleton*, 9 Mees. & W. 675. See Best, Ev. § 484.

§ 103. **Effect of Notice to Produce.**—Notice to produce is not sufficient to let in parol proof unless served before the term, where the paper is at the party's residence at a distance from the court. Notice at the trial is not sufficient. *Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *Story v. Patten*, 3 Wend. 488.

Notice to produce papers is sufficiently specific if it fairly apprises the party of what particular papers are wanted. *Walden v. Davison*, 11 Wend. 65, 25 Am. Dec. 602.

Where party refuses, after notice, to produce a paper in his possession material to the issue, the other party may give parol evi-



dence of its contents. *McKellip v. McIlhenny*, 4 Watts, 317, 28 Am. Dec. 711.

Mere notice to produce a book or record does not make it evidence when produced; but if the party who gave notice takes and inspects it, he takes it as testimony, and it may, if material, be used by either party. *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 657; *Sayer v. Kitchen*, 1 Esp. 210; *Johnson v. Gilson*, 4 Esp. 21; *Wharam v. Routledge*, 5 Esp. 235; *Wilson v. Bowie*, 1 Car. & P. 8; *Hawes v. Anglo-Saxon P. Co.* 101 Mass. 304.

The party notified to produce papers on a trial may either do so or introduce testimony to show why it is not possible. *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720; *McNair v. Wilkins*, 3 Whart. 551; *Dunham v. Riley*, 4 Wash. C. C. 126; *Tuttle v. Mechanics & T. Loan Co.* 6 Whart. 216; *Wright v. Crane*, 13 Serg. & R. 450.

Sir James Stephen's summary of the entire law governing this subject is a rare specimen of condensation. Arts. 138, 139, state the general rule as applied by the courts of records in this country, and are in the following language:

"When a party calls for a document which he has given the other party notice to produce, and such document is produced to, and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant."

"When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party."

The *subpœna duces tecum* is an ancient process, its issue of almost daily occurrence, and long since the absolute necessity for such process was proved (see *Amey v. Long*, 9 East, 473) by Lord Ellenborough. Its use is not, however, to be abused, and the Supreme Court of the United States, in the case *Ex parte Burtis*, 103 U. S. 238, 26 L. ed. 392, has held that, despite the loose practice which has grown up of these later days, it, like other writs, should not issue as of course, but only upon probable cause; that is to say, upon the showing of the materiality of the thing, to be produced upon order of the court. A prime essential of the legitimate use of the process, is that the papers, instruments, books or whatever it may be that are sought in evidence shall be described with reasonable certainty, either by date, title,

substance or subject matter. A call for papers of a given class, or which have passed between certain named parties during specific periods of time, or the like, is altogether insufficient. *Ex parte Brown*, 72 Mo. 83. Among the rights uniformly found in the Constitutions, State and Federal, within this nation, is the guaranty that the people of the nation and of the several States shall be kept free from unreasonable searches and seizures of their papers and effects (U. S. Const. Amend. 4; Const. Ill. 1870, art. 2, § 6); and any warrant to search anything pertaining to the citizen is required to describe that thing, as nearly as may be, and not to issue without probable cause, supported by oath or affirmation.

The power to issue this process is analogous to the power of equity to compel a discovery, by a party defendant, of any matter resting in his knowledge, or document in his possession, material to the issue joined and to be tried. Even in such a proceeding the power of the court does not extend to the compulsory discovery of aught that is not material to the issue made up, and limited thus it is liable to great abuse. 2 Fonbl. Eq. bk. 6, chap. 3; *Shaftsbury v. Arrowsmith*, 4 Ves. Jr. 67, by Lord Loughborough.

The New York Supreme Court at a very early period announced the principles which now obtain with reference to the production of documentary evidence at the trial, and as early as 1829 held that a reasonable notice must be given to produce books, papers, etc., at trial, and what was reasonable notice depended in all instances upon the circumstances of the case. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296.

The only effect of refusal to produce books after notice is that parol evidence of their contents may be given, and, if it is vague or uncertain, every legal intendment and presumption is against the party failing to produce the books. *Life & F. Ins. Co. v. Mechanics F. Ins. Co.* 7 Wend. 31.

A party is not bound to produce a paper unless on notice from the opposite party. *Waring v. Warren*, 1 Johns. 340.

When a witness who is intrusted with a written instrument, executed by the parties to the action, admits in court that it is then in his possession, he must produce it; and he cannot excuse himself from producing it, on the ground that he has not been served with *subpœna duces tecum*, or a notice to produce it. *Boynton v. Boynton*, 16 Abb. Pr. 87. And when a party requires its pro-

duction, it is the duty of the court to require such production, for the purpose of determining its materiality as evidence, and a refusal by the court to comply with such request will be error, even though it may not then appear that the paper is material evidence. *Ibid.*

It is of constant occurrence upon trials that a witness proves the execution of a paper put into his hands for that purpose, and that the paper is not given in evidence, unless the party who produced it thinks fit to use it. His right to refrain from using it under such circumstances is well settled. The paper does not become evidence in the cause by the mere proof of its execution. Unless it has been read in evidence, it remains under the control of the party to whom it belongs. Where the papers were produced and their genuineness proved by the witness, and the marking was made for the purpose of readily identifying the particular paper, that did not make them a part of the evidence in the case, until they were read in evidence, and the other party acquired no right over them. If he desired and was entitled to the benefit of them as evidence, he should have procured a discovery of them, or been prepared to give parol evidence of their contents on their not being produced. *Edmonstone v. Hartshorn*, 19 N. Y. 12.

Practitioners of national reputation are not agreed as to the relative merits of practice systems that allow of two distinct methods of bringing documents into court; the *subpoena duces tecum* and the notice to produce are well recognized as correlative measures equally effective when observed and entitled to great respect as necessary and indispensable adjuncts in any effective administration of justice. We have no concern with this dispute, and are perhaps not justified in even intimating a partiality for the latter method, which a very brief review of authorities will show is the dominant system in all jurisdictions that have adopted the reformed procedure. We indicate the prevailing rules in the following paragraphs with a view to a more intelligent apprehension of a subject by no means free from obscurity. The laws regulating the application of this doctrine of the *res gestæ* are no longer dependent upon the mere speculations of some text-writer, but rather upon the solid and sure basis of actual authority and precedent.

§ 104. **Effect of Refusal to Produce a Paper.**—A party is

not obliged to produce evidence against himself, though such evidence is in court, and he has had notice to produce it. *Law v. Wells*, Peake, 93.

If upon notice to produce books of account they are not produced, this circumstance affords no legal ground for any inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence. *Cooper v. Gibbons*, 3 Campb. 363. See *Leeds v. Cook*, 4 Esp. 256.

When a document is called for, and its production declined, the party so declining to produce it cannot afterwards make use of it for any purpose. *Collins v. Gashon*, 2 Fost. & F. 47; *Doe v. Hodgson*, 4 Perry & D. 142, 12 Ad. & El. 135, 2 Moore & Rob. 283, 4 Jur. 1202.

When a party refuses to produce a deed at the trial, and a copy is duly proved, he cannot afterwards exclude it by producing the original, and requiring it to be proved. *Edmonds v. Challis*, 6 D. & L. 581, 7 C. B. 413.

Defendant's refusal to produce his books and papers raises a presumption that, if produced, they would give complexion to the case, at least unfavorable, if not directly adverse, to the interest of the party. *Clifton v. United States*, 45 U. S. 4 How. 242, 247, 11 L. ed. 957, 959; *The Luminary*, 21 U. S. 8 Wheat. 407, 5 L. ed. 647; *Chaffee v. United States*, 55 U. S. 18 Wall. 545, 21 L. ed. 913; *Bas v. Steele*, 3 Wash. C. C. 381; *United States v. Gibert*, 2 Sumn. 19, 78.

The presumption of innocence may be overthrown, and a presumption of guilt be raised, by the misconduct of the party in suppressing or destroying evidence, which he ought to produce, or to which the other party is entitled. 1 Greenl. Ev. § 37.

Whatever rule may be laid down by the courts on this subject, it would not be possible in many cases to prevent a jury from being influenced by such a suppression of evidence; and in some cases the jury might very reasonably be influenced by it. *Bate v. Kinsey*, 1 Cromp. M. & R. 41; *Roe v. Harvey*, 4 Burr. 2484; 2 Phil. Ev. (3d Am. ed.) 222.

The refusal of a party to produce his books and papers is not to be regarded as prima facie evidence that, if produced, they would prove what the party calling for them alleges they contain. The rule is this: "The latter, in such case, may give secondary proof of the contents, if the papers are shown or admitted to be

in the possession of his adversary; and if the secondary evidence is imperfect, vague and uncertain, as to dates, sums, boundaries, etc., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence." *Life & F. Ins. Co. v. Merchants F. Ins. Co.* 7 Wend. 31, 33, 34.

All inferences from it shall be taken most strongly against the party refusing to produce. *Thayer v. Middlesex Mut. F. Ins. Co.* 10 Pick. 329.

Every fair presumption that can arise is to be made against such party, as to those parts of the contents which do not appear from the secondary evidence. *Symington v. M'Lin*, 1 Dev. & B. L. 291, 298.

The fact that a party refuses to produce his books upon a trial is not alone sufficient to establish a fraudulent disposition of the books with intent to deceive the adverse party. *Burr v. American S. S. B. Co.* 8 Abb. N. C. 403, 81 N. Y. 175, affirming 17 Hun, 188.

If the party refuses to produce at a trial a written instrument material to the case after being notified to do so, every inference in respect to the contents thereof, which is warranted by the evidence, should be indulged against him. *Wylde v. Northern R. Co.* 14 Abb. P. R. N. S. 213, 53 N. Y. 156.

The refusal to produce does not supply the place of secondary evidence so as to raise a presumption that the fact is as alleged; but it aids the secondary evidence by a presumption in favor of the construction of it most adverse to the party refusing. *Cohen v. Continental L. Ins. Co.* 69 N. Y. 300, 305, reversing 9 Jones & S. 296.

A party refusing, on notice, to produce a paper in his possession or under his control, and thus obliging his adversary to resort to parol or secondary evidence of its contents, cannot be allowed to contradict the secondary evidence thus given, without producing the paper itself. *Bogart v. Brown*, 5 Pick. 18.

Indeed, it has been held, that a party refusing to produce a paper in his possession, called for under a notice to produce, cannot be allowed afterwards to retract and put in the paper. *Doe v. Cockell*, 6 Carr. & P. 525.

The act of a party destroying a written instrument furnishes presumptive proof of its due execution; but before this presumption can arise, the purport of the paper destroyed must be shown

what it is alleged to have been. In other words, it must be identified in some way. *M' Reynolds v. M' Cord*, 6 Watts, 288, 290; *Cowper v. Cowper*, 2 P. Wms. 720, 752.

§ 105. **Foundation for Secondary Evidence.**—There is no uniform rule as to the necessary foundation for the introduction of secondary evidence; but the presiding judge must be reasonably satisfied that the document is lost, destroyed or beyond the jurisdiction of the court. When no probable motive appears for withholding the document, less evidence is required than under suspicious circumstances. *Jernigan v. State*, 81 Ala. 58. Thus, where it appeared that diligent search was made for the missing papers by the witness and his two attorneys, in whose possession he had left them, and who had since removed to distant counties, his testimony was held sufficient proof of their loss to let in secondary evidence of their contents, without the additional testimony of the attorneys. *Ibid.* See also *Hawn v. State*, 13 Tex. App. 383; Abb. Crim. Br. 266.

§ 106. **Further View of the Preliminary Proof.**—Without proof of the notice to produce the original of a writing in possession of the opposite party, given to him or his attorney, secondary evidence cannot be given. *De Baril v. Campoy y Pardo* (Pa.) 7 Cent. Rep. 642.

When the party offering secondary evidence testifies that the original is "lost or destroyed," without showing a search or other facts to support his statement, the court will not adopt the conclusion of the party, and secondary evidence will be rejected. *Anglo-American Pack. & P. Co. v. Cannon*, 31 Fed. Rep. 313.

Proof of an unsuccessful search for a deed by the person in whose possession it was last seen is a sufficient foundation for the introduction of secondary evidence of its contents, where the facts show that it must have been destroyed by the Chicago fire of 1871. *Berdel v. Egan*, 125 Ill. 298.

On a motion to introduce secondary evidence of a deed, the amount of evidence to show the existence of the original will vary with the circumstances of each case. Where no direct issue is made upon the fact, slight evidence will be sufficient. *Doe v. Aiken*, 31 Fed. Rep. 393.

Verbal statements as to the contents of telegrams sent are not admissible until the failure to produce better evidence is satisfactorily accounted for. *Chester v. State*, 23 Tex. App. 577.

Testimony to establish the contents of a telegram should not be admitted, in the absence of evidence showing its loss or destruction. *Prather v. Wilkens*, 68 Tex. 187.

Secondary evidence of the contents of a telegram cannot be given until its actual sending by the sender is proved. *Flint v. Kennedy*, 33 Fed. Rep. 820.

Where secondary evidence of the contents of a letter was objected to, upon the ground that it was not shown to have been mailed, testimony that the letter was sent must be understood to mean that it was mailed in the usual manner. *Ibid.*

Where proof is by a copy, an examined copy duly made and sworn to by a competent witness is always admissible. Authorities cited in *Otto v. Trump*, 7 Cent. Rep. 629, 115 Pa. 425.

After it is shown that notice to produce an original paper has been served, the original may be proved by a copy made at the same time as the original. Authorities cited in *Michigan L. & I. Co. v. Republican Trwp.* 9 West. Rep. 124, 65 Mich. 628.

§ 107. **Proof of Instruments Lost or Destroyed.**—Where letters constituting a contract are lost, secondary evidence is admissible. *Roehl v. Haumesser*, 12 West. Rep. 899, 114 Ind. 311.

In case of the loss of the official record of confiscation, it may be proved by proof of its previous existence and contents. *Sabariego v. Maverick*, 124 U. S. 261, 31 L. ed. 430.

Secondary evidence of destroyed records of naturalization is admissible. *Kreitz v. Behrensmeyer*, 14 West. Rep. 593, 125 Ill. 141.

§ 108. **Proof of Instruments in Other Party's Possession or beyond Reach.**—Where the production of a paper cannot be compelled, secondary evidence may be given. *Otto v. Trump*, 7 Cent. Rep. 629, 115 Pa. 425.

Proof that a paper is out of the State will not alone be sufficient foundation for secondary evidence. Authorities cited in *De Baril v. Campoy y Pardo* (Pa.) 7 Cent. Rep. 644.

Upon defendant's refusal to produce a copy of a notice served on him, the original of which is lost, parol evidence of its contents is admissible. *Johnson v. Johnson*, 14 West. Rep. 198, 70 Mich. 65.

A copy of a receipt is admissible, where the parties have

refused to produce it. *Com. v. Shurn*, 5 New Eng. Rep. 170, 145 Mass. 150.

In an action upon an insurance policy, secondary evidence of proof of loss is admissible, upon failure to produce the original in evidence on notice. *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. ed. 497.

§ 109. **Frequent Calls for Appeal to Secondary Evidence.**—Another frequent cause for an appeal to secondary evidence arises from those cases where the original or best evidence is lost or destroyed, and after diligent search and inquiry, its whereabouts are unknown. A party alleging the loss of a material paper, to make out a case authorizing secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. The person last known to have been in possession of the paper must be examined as a witness to prove the loss; if out of the State his deposition must be procured or some good excuse given for not doing so. The determination of the trial judge of the fact as to the loss is not reviewable by the appellate court, unless the proof of loss is so clear and conclusive that it was an unwarrantable exercise of discretion, amounting to error of law, to find against him. *Kearney v. New York*, 92 N. Y. 617 (1883).

§ 110. **Judicial Utterances on the Subject.**—Casting the judicial utterances of a recent period into the form of affirmation, we have this: Secondary evidence is only admissible where the writing cannot be produced; and proof must be given of the exercise of reasonable diligence in the effort to procure the original. *Boyle v. Wiseman*, 29 Eng. L. & Eq. 473; *Deaver v. Rice*, 2 Ired. L. 280; *Dickinson v. Breeden*, 25 Ill. 186; *Ralph v. Brown*, 3 Watts & S. 395; *Shepard v. Giddings*, 22 Conn. 282; *Wood v. Cullen*, 13 Minn. 394; *Johnson v. Arnwine*, 42 N. J. L. 461; *Turner v. Yates*, 57 U. S. 16 How. 14, 14 L. ed. 824; *Simpson v. Dull*, 70 U. S. 3 Wall. 460, 475, 18 L. ed. 265, 267; *Blackburn v. Crawford*, 70 U. S. 3 Wall. 175, 183, 18 L. ed. 186; *Jackson v. Frier*, 16 Johns. 193; *Parkins v. Cobbett*, 1 Car. & P. 282; *Taunton Bank v. Briggs*, 5 Pick. 436; *Empire Transp. Co. v. Stule*, 70 Pa. 188. The rule requiring proof of diligence preliminary to admitting



secondary evidence should in all cases be strictly enforced. *Quilter v. Jorss*, 14 C. B. N. S. 747; *Gully v. Exeter*, 4 Bing. 290; *Brewster v. Sewell*, 3 Barn. & Ald. 296; *Freeman v. Arkell*, 2 Barn. & C. 495; *Graham v. Chrystal*, 2 Abb. App. Dec. 264. The question whether the absence of a document is sufficiently accounted for is addressed to the trial judge, and the court on appeal will not reverse his decision of that question, except when he is clearly wrong. *Jackson v. Frier*, 16 Johns. 193; *Quilter v. Jorss*, *supra*; *Graham v. Chrystal*, *supra*; *Reg. v. Saffron*, 16 Eng. L. & Eq. 358; *Nicholson v. Conner*, 8 Daly, 215; *Sheridan v. New York*, 68 N. Y. 30; *Gildersleeve v. Landon*, 73 N. Y. 609.

§ 111. **Extract from a Late Opinion of Judge Rapallo.**—The language of *Judge Rapallo* in *Kearney v. New York*, *supra*, is suggestive: "The first glaring defect is that, although the paper was last seen in Scanlon's possession, and although the witness says that Scanlon subsequently assisted in the search for it, he was not examined as a witness. The only excuse offered for this omission is the testimony of the plaintiff that, since the assignment of the claim to him, Scanlon has not been living in the City, County and State of New York. It was not shown however, that there was any difficulty in reaching him, and it has repeatedly been held that the person last known to have been in possession of the paper must be examined as a witness, to prove its loss; and that even if he is out of the State, his deposition must be secured if practicable, or some good excuse given for not so doing."

§ 112. **Absence of a General Rule.**—The proof necessary to establish the loss of a writing, so as to let in secondary evidence of its contents, must depend upon the nature of the transaction to which it relates, its apparent value and other circumstances. No general rule can be laid down upon this subject, applicable alike to all cases. Each case must depend essentially upon its own circumstances. If suspicion hangs over it, and there is any reason to believe that it is designedly withheld, a rigid inquiry should be made into the reason of its non-production; but if there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original, in respect to which the courts extend great liberality. *Williams v. United States*, 42 U. S. 1 How. 299, 11 L. ed. 138; *De Lane v. Moore*, 55 U. S. 14 How. 265, 14 L. ed. 414; *Juzan v. Toulmin*, 9 Ala. 663; *Jones v. Scott*, 2 Ala. 61.

§ 113. **A Pennsylvania Precedent.**—Where the instrument

required is unimportant, and the facts its recitals would disclose, if produced, are of subordinate interest in the trial, a less degree of diligence will be required in the effort to produce it. This rule seems to have had its origin with the Pennsylvania courts, and is believed to be a dangerous proposition to establish. We cite it as controlling within the limits of that jurisdiction. *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507.

§ 114. **Secondary Evidence Showing the Contents of a Public Document.**—Many considerations urged and sanctioned the adoption of a rule allowing the introduction of secondary proof respecting the contents of a public document. Its obvious necessity is doubtless the primary reason of the rule, while its subserviency of public interest and convenience gives it additional encouragement and favor as a salutary rule of law.

§ 115. **Theories Which Underlie Introduction of Certified Copies.**—The theories which underlie the production in evidence of certified copies, are now so generally in vogue that comment under this branch of our subject is of little importance. The practitioner will remember that in many of our jurisdictions the common-law formulas of procedure are still retained; and while ample statutory provision may exist, regarding a certain matter of procedure, while arbitrary rules govern and prescribe the line of evidence, most of those jurisdictions still allow a party to repose upon the common-law methods of proof.

§ 116. **Common-Law Provisions on This Subject.**—Respecting the nature and scope of, but more accurately the extent to which, the English common law has been adopted in this country, this adoption is only to the extent it conforms to our institutions and our methods of government. In so far as it is subservient to the habits and conditions of society, and is in harmony with the genius, spirit and objects of our institutions, the English common law may be regarded as a welcome auxiliary to our legislative enactments. *Boyer v. Sweet*, 4 Ill. 120; *Barlow v. Lambert*, 28 Ala. 704; *Stout v. Keyes*, 2 Dougl. (Mich.) 184; *Lindsley v. Coats*, 1 Ohio, 245.

§ 117. **Extent of Their Adoption in Illinois.**—In Illinois the General Assembly adopted the common law, and with few exceptions, all the British statutes of a general nature in aid thereof, passed prior to the fourth year of James II., as the rule of

decision until altered or repealed. *Fisher v. Deering*, 60 Ill. 114. The same course was adopted in Indiana. *Dawson v. Coffman*, 28 Ind. 220. And in Ohio, in 1793, a similar statute was passed, which was repealed in 1805, re-enacted and again repealed in the year following, since which time no legislation has been had on the subject. *Crawford v. Chapman*, 17 Ohio, 452. In Iowa the common law has always been recognized, and by the Ordinance of 1787 it was expressly made the law of the Territory of Iowa. *O'Ferrall v. Simplot*, 4 Iowa, 381; *State v. Twogood*, 7 Iowa, 252. So in Nevada. *Hamilton v. Kneeland*, 1 Nev. 40.

§ 118. **In Massachusetts.**—In Massachusetts, so much of the common law of England as was brought to that colony by the colonists, with the statutes then in force amending or altering it, such of the more recent English statutes, passed since the emigration, as have been since adopted in practice, together with certain ancient usages originating probably from laws passed by the Legislature of the Colony of Massachusetts Bay, form the body of the common law of that State, subject, however, to certain changes made by Provincial and State Legislatures, and to the provisions of the Constitution of the State. *Com. v. Knowlton*, 2 Mass. 530

§ 119. **In Tennessee.**—In Tennessee the whole body of the common law on the subject of domestic relations has been adopted, except so far as modified by statutes. *McCorry v. King*, 3 Humph. 267. By common law is meant our own precedents, practice and reports, and the English reports and other books usually considered the depositories of the common law before the Revolution, making in all cases the necessary allowances for its applicability and suitableness to our situation. *Stump v. Napier*, 2 Yerg. 45.

§ 120. **In Louisiana.**—With the exception of Louisiana, the several States in the Union have in some form adopted the common law. The extent of this adoption must be settled by the statutes and reports of the several States.

§ 121. **Views of the United States Supreme Court as to Common-Law Methods of Evidence.**—The Supreme Court of the United States has declared that it is clear that there can be no common law of the United States. The federal government is composed of sovereign and independent States, each of which may have its local usages, customs and laws. There is no princi-

ple which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of the federal system only by legislative adoption. When therefore a common-law right is asserted in a federal court, the court will look to the State where the controversy originated. *Wheaton v. Peters*, 33 U. S. 8 Pet. 658, 8 L. ed. 1079. See also *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *Lorman v. Clarke*, 2 McLean, 568.

The "common law" mentioned in the seventh article of Amendment of the Constitution of the United States is the common law of England, and not of any individual State. *United States v. Wanson*, 1 Gall. 20. The phrase is used in that article in contradistinction to equity, admiralty and maritime jurisprudence, and embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume, to settle legal rights. *Parsons v. Bedford*, 28 U. S. 3 Pet. 446, 7 L. ed. 736.

In the federal courts it has been strongly intimated that, as the common law of England has never been adopted in all its provisions in any State of the Union, the party who seeks to enforce a right not theretofore asserted or established by the decision of the state court where the controversy arose, nor by custom or usage, must give some evidence tending to show to what extent the common law was adopted in that State before he can maintain his action, and enforce his demand as a right guaranteed to him by the common law. *Wheaton v. Peters*, 33 U. S. 8 Pet. 591, 658, 659, 8 L. ed. 1055, 1079, 1080.

§ 122. **Effect of Abrogation of the Common Law upon Secondary Evidence.**—If the common law has been abrogated, changed or modified by a statute of another State, this must be made a matter of proof under the rules of evidence under the State where the litigation is pending. *White v. Knapp*, 47 Barb. 549; *Holmes v. Broughton*, 10 Wend. 75; *Donegan v. Wood*, 49 Ala. 242.

These presumptions do not apply to the States of Florida, Louisiana and Texas. *Norris v. Harris*, 15 Cal. 226.

§ 123. **Secondary Evidence where Party has been Deprived of the Original by Fraud.**—It is scarcely necessary to expand the proposition implied by the heading of this paragraph. Actual or positive fraud includes any cunning deception or artifice used

to circumvent, cheat or deceive another. 1 Story, Eq. Jur. §§ 186, 187. But fraud, in the sense of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which any undue and unconscientious advantage is taken of another. *Id.* See also *Gale v. Gale*, 19 Barb. 249; *Dickinson v. Chesapeake & O. R. Co.* 7 W. Va. 390; *Kennedy v. Kennedy*, 2 Ala. 571; *Belcher v. Belcher*, 10 Yerg. 121; *Story v. Norwich & W. R. Co.* 24 Conn. 94. It is familiar law that fraud will vitiate all acts and contracts, however solemn, and will often invade the judicial sphere for the purpose of abrogating the most conclusive judgments. The relation that active or constructive fraud may sustain to legal presumptions will receive appropriate treatment hereafter. In this connection, it will suffice to remind the practitioner that the burden of proof is with the party alleging the fraud. *Warren v. Gabriel*, 51 Ala. 235; *Vanbibber v. Beirne*, 6 W. Va. 168; *Klein v. Horine*, 47 Ill. 430; *Morgan v. Olvey*, 53 Ind. 6.

**a. Fraud may not be Proved, but Inferred.**—Direct and positive proof of fraud is not required. *Strauss v. Kranert*, 56 Ill. 254; *Stikeman v. Dawson*, 1 DeG. & Sm. 105. It may be established by proving circumstances from the existence of which a fraudulent intent is a natural and irresistible inference (*Waddingham v. Loker*, 44 Mo. 132; *Bowden v. Bowden*, 75 Ill. 143; *Re Vanderveer*, 20 N. J. Eq. 463; *McDaniel v. Baca*, 2 Cal. 326; *Furmer v. Calvert*, 44 Ind. 209; *Stewart v. Strasburger*, 51 How. Pr. 388; *Kaine v. Weigley*, 22 Pa. 179); and all circumstances, trivial in themselves may, when combined together, afford irrefragable proof of fraudulent intent (*Hopkins v. Sievert*, 58 Mo. 201. See *Brady v. Barnes*, 42 Conn. 512); but circumstances of mere suspicion will not warrant the conclusion of fraud (*Taylor v. Fleet*, 4 Barb. 95; *Clarke v. White*, 37 U. S. 12 Pet. 178, 9 L. ed. 1046); and if the case made out is consistent with fair dealing and honesty, the charge of fraud fails. *Pares v. Pares*, 33 L. J. Ch. 218. And see *Steele v. Kinkle*, 3 Ala. 352. While a court may properly, in some cases, infer fraud from certain facts found, yet it is constructive or legal as distinguished from actual fraud, and the inference is one of law and not of fact. *Brady v. Barnes*, 42 Conn. 513.

**b. The Rule as to Fraud Stated.**—In order to establish fraud,

the true rule in all courts is to require such legal evidence as will overcome in the mind of the tribunal the legal presumption of innocence, and beget a belief of the truth of the allegation of fraud. *Marksbury v. Taylor*, 10 Bush, 519. Evidence of acts done before any rights of the parties charging fraud had supervened, which tend to illustrate the conduct of the parties, and develop their relations, is admissible. *Craig's App.* 77 Pa. 448. And see *Moog v. Benedicks*, 49 Ala. 512; *United States v. A Quantity of Tobacco*, 6 Ben. 68; *King v. Fitch*, 2 Abb. App. Dec. 508, 1 Keyes, 432; 3 Wait, Act. and Def. 446.

**c. A Corollary of These Propositions Stated.**—The proposition then may be regarded as clearly established, that where a party has been deprived of primary evidence by fraud to the extent of having personal and property rights in jeopardy, parol evidence may be introduced to show the fraud, and on its being satisfactorily established, secondary evidence is admissible. Professor Greenleaf at section 89 of his Treatise on Evidence cites still another instance in which secondary evidence is allowable, and upon his authority it seems that in all cases where the written communication or agreement between the parties is collateral to the question in issue, it (the original document) need not be produced, as where the writing is a mere proposal which has not been acted upon, or where a written memorandum was made of the terms of the contract which was read in the presence of the parties, was never signed or proposed to be signed; or where during an employment under a written contract a separate verbal order is given; or where the action is not directly upon the agreement, for non-performance of it, but is in tort, for the conversion or detention of the document itself; or where the action is for the plaintiff's share of money had and received by the defendant, under a written security for a debt due them both. See also *Shoenberger v. Hackman*, 37 Pa. 87; *Scott v. Baker*, 37 Pa. 330; *Cecil Bank v. Snively*, 23 Md. 253; *Supples v. Lewis*, 37 Conn. 568; *Ward v. Busack*, 46 Wis. 407. So, the fact that a letter was written may be proved by oral evidence, although its contents cannot. *Holcombe v. State*, 28 Ga. 66. So, when a deposit is made in the bank of a draft, if only the amount of the deposit is in issue, it may be proved by oral evidence. *Bowen v. National Bank of Newport*, 11 Hun, 226. The rule stated by Mr. Greenleaf in sec. 89 has been disputed. 2 Phillips, Ev. (Cow. & H. ed.) 398; *Gilbert v. Duncan*, 29 N. J. L. 133.

§ 124. **Secondary Evidence in Cases where the Primary Evidence is in the Control of a Stranger.**—As we have seen, primary evidence involves the introduction of the original instrument, the presence of which is necessary to the ascertainment of a given fact. This grade of evidence is universally required, except in instances that it is the province of these chapters to discuss. It sufficiently appears that where the original paper is shown or appears to be in the possession or control of the adverse party, and when, after due notice to produce it, he fails to comply, secondary evidence is admissible. I shall now discuss those instances where the original paper is shown or appears to be in the possession or under the control of a stranger, who is under no legal obligation to produce it, and who, reposing upon his rights, absolutely refuses to produce it.

Resort is usually had in these cases wherever practicable to a *subpœna duces tecum*. Instances of frequent occurrence are easily recalled, as coming directly within the scope of this exception. An attorney, under a well-settled principle of law, refuses to produce a document in his possession, and bases his refusal upon the contractual relations he sustains to his client. An illustration of this case is found in *People v. Benjamin*, 9 How. Pr. 419. The facts disclosed by the opinion were substantially as follows: The attorney for the defendant was called upon as a witness for the plaintiff, upon a *subpœna duces tecum*, to produce a bill of sale between the parties; and he testified that he had the bill of sale then in his pocket, that he received it in his character of counsel for the defendant, after he was employed as such counsel in the action; that he considered himself under obligations not to disclose or produce it, unless by the consent of his client, and refused to do so, unless by his orders. *Held*, That an order of the justice requiring the attorney to produce the bill of sale, and his subsequent conviction for contempt in not doing so, were unauthorized and unlawful. Why? Because the bill of sale was evidence intrusted to the attorney in the confidence growing out of the relation of counsel and client, and he was not at liberty to furnish the adverse party with it, or to testify to any fact which had come to his knowledge in consequence of that relation.

Prior and subsequent adjudications of our courts sustain the same position, and we may regard it as established law that an attorney is not bound to produce in evidence documents intrusted to him by a client, but he may be examined as to the fact of their

existence for the purpose of enabling the opposite party to give parole evidence of their contents. See *Lynde v. Judd*, 3 Day, 499; *Jackson v. Burtis*, 14 Johns. 391; *Kellogg v. Kellogg*, 6 Barb. 116; *Durkee v. Leland*, 4 Vt. 612; *Jackson v. M' Vey*, 18 Johns. 330; *Rhoades v. Selin*, 4 Wash. C. C. 718; *Jackson v. Denison*, 4 Wend. 558; *Doe v. Ross*, 7 Mees. & W. 102; *Davies v. Waters*, 9 Mees. & W. 608; *Doe v. Langdon*, 12 Q. B. 711; *Doe v. Harris*, 5 Car. & P. 592.

The privilege does not extend to a combination between attorney and client to prevent the court from compelling the production of important papers at the trial. *People v. Sheriff of New York*, 29 Barb. 622, 7 Abb. Pr. 96.

An attorney who has in his possession receipts which his client could be compelled to produce or disclose, can also be compelled to produce them or testify as to their contents. *Andrews v. Ohio & M. R. Co.* 14 Ind. 169; *Ex parte Maulsby*, 13 Md. App. 625. See further, on general subject, *McPherson v. Rathbone*, 7 Wend. 216; *People v. Benjamin*, 9 How. Pr. 419.

The protection of confidential communications made to professional advisors is dictated by a wise and liberal policy. If a person cannot consult his legal advisor without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotism. It would be a prohibition upon professional advice and assistance. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251 (1877).

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## CHAPTER VII.

### DOCUMENTARY EVIDENCE.

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### § 125. What the Term Includes—Various Definitions.—

Under this term are properly included all material substances on which the thoughts of men are represented by writing or any other species of conventional mark or symbol; this is the comprehensive definition by Best.

Sir James Stephen's definition is more restricted: "Any substance having any matter expressed or described upon it by marks capable of being read (Dig. Law Ev., Art. 1.)

Chamberlain, in his valuable annotations on the treatise of Best, at page 215, comments suggestively as follows: "Within

these definitions, a ring or banner with an inscription, a musical composition, and a savage tattooed with words intelligible to himself, would all be documents. Photographs, caricatures, wooden tallies, and the like, would probably be excluded under Stephen's definition; not apparently under the others.

While the sweeping definitions given *supra* are probably sufficiently accurate for the purpose of distinguishing documentary from personal evidence, it may be doubted whether the definition of "document" could not with advantage be narrowed to the single case of writing as a means of conveying thought in certain instances. Thus it is submitted, the so-called "best evidence rule" (see C. III. (a) of this note, *infra*) applies only to written documents. Thus, for example, in *Com. v. Morrell*, 99 Mass. 542, it was held that a tag of a valise on which words were inscribed was not a document. But see *Memphis & C. R. Co. v. Maples*, 63 Ala. 601.

§ 126. **Public Documents.**—"An instrument of record concerning the business of the people at large, preserved in or emanating from any department of government; also, a publication printed or issued by order of one or both houses of Congress or of a State Legislature." Anderson's Law Dict. Title *Document*.

Public documents include State papers, maps, charts, and like formal instruments, made under public auspices. A copy of such document, issued by public authority, is as valid as the original; as, an officially published statute. The term also embraces official records required to be kept by Statute. See *McCaul v. United States*, 1 Dak. 321 (1876), cases; 1 Sup. Rev. Stat. pp. 154, 288.

There are records which partake both of a public and private character, and are treated as the one or the other, according to the relation in which the applicant stands to them. The books of a corporation are public with respect to strangers. Haine's Treatise, 677.

The California Code of Civil Procedure, after dividing all writings into two kinds, viz.: public and private, declares public writings to be: 1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this State, of the United States, of a sister State or of a foreign country; 2. Public records of public writings. Cal. Code Civil Proc. (1888) § 18.

Public documents, presumptively, contain the records made by the public functionaries in the executive, legislative and judicial departments of the government. They import necessarily a high degree of credibility. Their recitals are supposed to contain authentic memoranda of what especially concerns the general public. And they are frequently the memorials and repositories of both vested and inchoate rights. It is contrary to public policy and the rules of effective government to allow them to be disturbed. In rare instances, where clerical error can be disclosed, or where fraudulent practices can be established, a public document can be assailed and its force and effectiveness utterly vitiated. But from a very early period these documents have been open to inspection at all reasonable hours, and frequently where written and other documents are in the official custody of some officer of the court, inspection may be had upon due application, and an order granted. *Rea v. Staffordshire*, 6 Ad. & El. 99; *Atherfold v. Beard*, 2 T. R. 610; *Stone v. Crocker*, 24 Pick. 88.

§ 127. **The Statutory Law.**—The statutory law of the various States makes ample provision for the introduction of public documents in evidence, and indicate the method to be adopted. Many of the principles which underlie the introduction of judicial records in evidence apply to the principle under discussion. It will be remembered that not only are the judicial proceedings of the courts of any State admitted in evidence, when properly attested, but the records also are entitled to the same privilege. The language of the Congressional Act is “the records and judicial proceedings of the courts of any State shall be proved if admitted in any other State in the United States by the attestations of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form.” (Act of May 26, 1790, § 1; 1 Story, Laws U. S. 93). This Act was passed pursuant to the Constitution, conferring the power upon Congress to prescribe the manner in which public acts, records and judicial proceedings of one State shall be proved in any other State and the effect to be given to them. (Const. U. S. art. 4, § 1.)

The Act prescribes the persons by whom the records shall be attested, but the form of the attestation, and that alone, is not prescribed, but must conform to the usage of the State in which

the record is, and not to that of the United States or of the State in which it is to be used in evidence. *Morris v. Patchin*, 24 N. Y. 395.

*Judge Allen* in the above entitled cause lays down the rule that the clerk alone can certify under this statute, and that the certificate of his under clerk in his absence is incompetent.

§ 128. **Examined Copy.**—The most felicitous evasion of the embarrassments frequently encountered, under the old practice in introducing public documents in evidence is by “examined copy,” that is, a copy sworn to be a true copy by a witness who has compared it carefully with the original. This mode of proof avoids much inconvenience. There is an insuperable objection to the actual production of the original documents themselves. They are, comparatively speaking, little liable to abstraction, alteration or misrepresentation. The entire community are interested in their preservation. With but few exceptions they are subject to daily inspection, and they are frequently required for evidentiary purposes, so frequently, in fact, as to be demanded in several places at the same time. Obviously this constant handling and bandying would result in mutilation and loss, and the rule of “examined copy” avoids much confusion, delay and hardship.

§ 129. **Provisions of the New York Code.**—All States that have adopted the reformed procedure inaugurated by the New York Legislature in 1848 have express legislation upon this subject, and the provisions of the New York Code may be taken as typical. “Where the officer to whom the legal custody of a paper belongs, certifies, under his hand and official seal, that he has made diligent examination in his office for the paper, and that it cannot be found, the certificate is presumptive evidence of the facts so certified, as if the officer testified to the same.” N. Y. Code Civ. Proc. § 921.

Such an enactment is essential to meet that class of cases constantly arising where a public document has been mislaid or is not for any reason at the time available. Its scope has been extended until in all the States well recognized rules have been enacted touching the exemplification of public documents preparatory to their introduction in evidence. Usually the certifying officer must state in his certificate that the copy certified to has been compared by him with the original, and is a correct transcript thereof. The Statute in most instances also requires that the

document or copy should be attested by the official seal, and the impression may be made directly on the paper.

The certificate must conform to the requirements of the statute in relation to the matters which are required to appear in it, or it will not be sufficient to authorize the reading of the copy of the certified paper in evidence. The certificate must show that the paper certified contains a copy of the whole of the original; it is not enough to state that it is a correct copy.

Where proofs by certified copies of papers are substituted for common-law evidence, all the forms directed by the statute, whether preliminary or substantial, must be strictly complied with. *Rogers v. Jackson*, 19 Wend. 383-385.

§ 130. **Recent Legislation on the Subject.**—Colorado legislation illustrates the latest phase of statutory enactment concerning this subject of public documents. Its Code of Civil Procedure, as amended in 1889, provides:

“A copy of any document or record or paper, in the custody of a public officer of this State or of the United States, within this State, certified under the official seal, or verified by the oath of such officer to be a true, full and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this State, in the like manner, and with the like effect as the original could be if produced.” Rice’s Annotated Code Civ. Proc. § 422 (1890).

It must be remembered, however, that courts do not take judicial notice of the statutes of other States. They must be set out in the pleadings, and proved like other facts. *Polk v. Butterfield*, 9 Colo. 325 (1886).

§ 131. **Provisions of the California Code.**—Every public officer having the custody of a public document which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it on payment of the legal fees therefor, and such copy is admissible in evidence in like cases and with like effect as the original writing. Cal. Code Civ. Proc. § 1893.

§ 132. **The Nebraska Code.**—The Nebraska Code is a substantial re-enactment of the same provision. The phraseology employed in the various Code sections relating to the subject is identical. Neb. Code, § 396. See also a general reference to this subject in 3 Estee, Pl. (1879) 539. These provisions are merely declaratory of the well recognized modern rule.

While the practitioner must in all instances refer to local statute regulating the introduction of public documents in evidence, those acts will, as a rule, embody but one principle and speak but one language. Quite recently (1874) the Legislature of California, after mature deliberation and extended debate, adopted a statute which combines the best features of the various State and Federal acts now in force regulating this subject. As a comprehensive epitome of the law, we give the sections of that act now in operation.

§ 133. **Proof of Official Documents.**—Official documents may be proved as follows:

1. Acts of the executive of this State, by the records of the state department of the State; and of the United States, by the records of the state departments of the United States, certified by the heads of those departments respectively. They may also be proved by public documents, printed by the order of the Legislature or Congress, or either house thereof.

2. The proceedings of the Legislature of this State, or of Congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk, or printed by their order.

3. The acts of the executive, or the proceedings of the Legislature of a sister State, in the same manner.

4. The acts of the executive, or the proceedings of the Legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the Executive of the United States.

5. Acts of a municipal corporation of this State, or of a board or department thereof, by a copy certified by the legal keeper thereof, or by a printed book published by the authority of such a corporation.

6. Documents of any other class in this State, by the original or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister State, by the original or by a copy certified by the legal keeper thereof, together with the certificate of the Secretary of State, Judge of the Supreme, Superior, or County Court, or Mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original.



8. Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.

9. Documents in the departments of the United States Government, by the certificate of the legal custodian thereof. Cal. Code Civ. Proc. § 1918.

Sister State includes United States and Territories. *Id.* 1924.

These rules of evidence are subject to legislative control, and the right to affect such change as may be expedient is practically unrestricted if the rules established are impartial and uniform in application. *Gage v. Carraher*, 14 West. Rep. 923, 125 Ill. 451.

§ 134. **The New York Commission to Devise and Regulate a Code of Evidence.**—Without doubt the ablest commission ever appointed in any country to devise and regulate a Code of Evidence, has just closed its labors in the State of New York. That commission, consisting of David Dudley Field, David L. Follett and William Rumsey, has had under constant, critical review every statutory enactment relating to the law of evidence that has been engrafted upon the law of both England and America. They have brought to the consideration of this task rare mental aptitude, the ripest scholarship and the highest possible phase of judicial acumen. The result of their labors may well be regarded as a monumental exhibit of what trained logicians can produce in the way of a codified law upon this subject. Their deliberations were characterized by a spirit of liberality as to the existing law, and after a careful analysis of the California, Colorado, and other Code Provisions, they report a draft of a Code of Evidence to the New York Legislature, which may well be considered as embodying the matured reflection of the best juridical minds.

§ 135. **Definitions by the Commission.**—They define public writings or documents as:

(1) The written acts or records of the acts of sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this State, of the United States, of a sister State, or of a foreign country.

(2) Public records, kept in any State, of private writings.

Sections 82 and 83 provide that the contents of proclamations,

State papers, public documents and legislative journals printed by the official printer under the authority of Congress or the Legislature respectively, or of either branch thereof, may be proved by the printed copy or by the original, and that the recitals in a public statute are proof of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are evidence between parties who claim under its provisions, but no further.

The United States and Circuit Courts will take judicial notice of the statutes, laws and usages of the several States without requiring the same proof as of foreign laws.

Statutes purporting to be published by authority of a State are admissible to prove what the statute law of such State is upon a given matter, and the burden of discrediting them is upon the party against whom they are offered. See Chap. II., *Ante* on "Judicial Notice," also *Toulandou v. Lachenmeyer*, 6 Abb. Pr. N. S. 215; *Comparet v. Jernegan*, 5 Blackf. 375; *Merrifield v. Robbins*, 8 Gray, 150; *Allen v. Watson*, 2 Hill, L. 319; *Emery v. Berry*, 28 N. H. 473.

Summarizing the conclusions of authority regarding the admissibility and effect of public documents as instruments of evidence, we may say that to render such documents, when properly authenticated, admissible in evidence, their contents must be pertinent to the issue. It is also necessary that the document be made by the person whose duty it was to make it, and that the matter it contains be such as belonged to his province, or came within his official cognizance or observation. Documents having these requisites are in general, admissible to prove, either *prima facie* or conclusively, the facts they recite. Greenl. Ev. § 491.

### § 136. Records of the United States Courts, How Proved.

—The records of courts of the United States are proved by exemplified copies, under the seal of the court, and certified by the clerk. *Pepoon v. Jenkins*, 2 Johns. Cas. 119. And by Act of May 14, 1845, it is provided that a copy of any records and proceedings of the district and circuit courts of the United States may be received in evidence in all courts of this State when certified by the clerk or officer in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom, and of the whole of such original, and attested by the official seal of such officer.

Laws 1845, Chap. 303, p. 326; Desty, Fed. Proc. § 906, states the rule of the Federal courts, regulating the admission of testimony. The language is: "All records and exemplifications of books, which may be kept in any public office of any State or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or territory, or in any such country by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate.

Modern legislation has made ample provision for the introduction of public documents in evidence; and while these various provisions vary somewhat in phraseology, the scope and meaning of their various recitals is substantially the same.

§ 137. **Typical Legislation on this Subject.**—First as typical of code legislation I will cite the New York Code of Civil Procedure.

a. **Statutes, etc. How Proved.**—§ 932. A Statute, or joint resolution, passed by the Legislature of the State, may be read in evidence, from a newspaper, designated, as prescribed by law, to publish the same, until six months after the close of the session at which it was passed; and, at any time, from a volume printed under the direction of the Secretary of State.

b. **Copies of Records and Papers in Certain Offices, Presumptive Evidence.**—§ 933. A copy of a paper filed, kept, entered or recorded, pursuant to law, in a public office of the State, the officer having charge of which has, pursuant to law, an official seal; or with the clerk of a court of the State; or with the clerk or secretary of either House of the Legislature, or of any other public body or public board created by authority of a law of the State, and having, pursuant to law, a seal; or a transcript from a record kept, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence, as if the original was produced. But to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court; or by the officer having the custody of the original, or by his deputy or clerk, appointed pursuant to law, under his official seal, and the hand of the person certifying; or by the presiding officer, secretary, or clerk of the public body or board, appointed pursuant to law, under his hand, and, except where it is certified by the

clerk or secretary of either House of the Legislature, under the official seal of the body or board.

**c. Papers Filed With Town Clerk.**—§ 934. A copy of a paper filed, pursuant to law, in the office of a town clerk, or a transcript from a record kept therein, pursuant to law, certified by the town clerk, is evidence, with like effect as the original.

§ 138. **Further Illustration of Proof Allowed in the United States Courts.**—Written laws may be proved by properly authenticated copies; unwritten by parol testimony of experts. *Ennis v. Smith*, 55 U. S. 14 How. 400, 14 L. ed. 472.

Foreign laws must be proved like other facts; they must be verified by oath, or by some high authority not less to be respected than the oath of an individual. *Church v. Hubbard*, 6 U. S. 2 Cranch, 187, 2 L. ed. 249.

A copy of an instrument can be admitted in evidence only upon being proved a true copy. *Smith v. Carrington*, 8 U. S. 4 Cranch, 62, 2 L. ed. 550.

Where copies are made evidence by statute, the mode of authentication must be strictly pursued. The Legislature may establish new rules of evidence in derogation of the common law, but the judicial law is limited to the rule laid down. *Smith v. United States*, 30 U. S. 5 Pet. 292, 8 L. ed. 130.

It will be well to add that much of the learning displayed by the early textwriters on the subject of official documents in evidence has been rendered obsolete by modern legislation. Especially is this true since such ample provision has been made for the inspection of documents. It is doubtful whether our Department of State contains any secrets, the disclosure of which would prove detrimental to public concerns. Even the secret sessions of the United States Senate are under the ban of public opprobrium. Doubtless in the event of actual war, the executive or the legislative department of the government would be entirely justified in and find ample precedent for withholding information sought to be obtained through the sanction of a judicial writ, but emergencies of this magnitude usually provide for themselves, and I merely state the fact certified by every day's experience, from Maine to California, that judicial process properly authenticated and properly served is undoubtedly sufficient to draw from any recess state or national, any document required in the furtherance of justice or in the support of a freeman's rights.

Incidentally this subject receives further expansion in the chapters devoted to Judicial Documents. The practitioner is also referred to Desty's Federal Procedure (7th ed.) chap. 17; to Cal. Code Civ. Proc. Part 4, title 2, and to N. Y. Code Civ. Proc. chap. 9, title 4.

Rules as to written laws, copies, etc., of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor or secretary of state, the chancellor or keeper of the great seal of the State or territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court it shall be authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified; or if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the State, territory or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or office of the State, territory or country, as aforesaid, from which they are taken.

Federal courts also provide for the proof of laws and legislative records. The public laws of a State may be read in these courts, and the exercise of any authority which they contain may be deduced historically from them; but private laws and special proceedings are governed by a different rule. *Leland v. Wilkinson*, 31 U. S. 6 Pet. 317, 8 L. ed. 412; *Course v. Stead*, 4 U. S. 4 Dall. 22, 1 L. ed. 724.

Printed journals of either house of a Legislature, published in obedience to law, are competent evidence of its proceedings. *Post v. Kendall County Suprs.* 105 U. S. 667, 26 L. ed. 1204; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154.

A pamphlet of the laws of a sister State, purporting to be printed by the law printer, is admissible in evidence. *Thompson v. Musser*, 1 U. S. 1 Dall. 458, 1 L. ed. 222.

Under the Act of May 26, 1790, Chap. 38, copies of the legislative acts of the several States, authenticated by having the seal of the State affixed thereto, are conclusive evidence of such acts in the courts of other States of the Union. No other formality is required than the annexation of the seal, which will be pre-

sumed to have been done by an officer having custody thereof and competent authority to affix it. *United States v. Amedy*, 24 U. S. 11 Wheat. 392, 6 L. ed. 502; *United States v. Johns*, 4 U. S. 4 Dall. 412, 1 L. ed. 888.

§ 139. **Legislation of Illinois.**—By express legislation in most if not all the States ample provision has been made for the introduction in evidence of documentary memorials that are of a public character. The various legislative enactments engrafted upon the Illinois statute book have withstood the practical test of many years of violent litigation during which period valuable suggestions naturally arising from any defects in the application of these laws, have assumed an amended statutory form, until at the present date the various provisions are believed to embody the best results as yet attained in this particular department of evidentiary law; the wide adoption of the Illinois rule in many western jurisdictions gives additional value to their recital and it is thought expedient to reproduce in full the text of these well digested Statutes. Rev. Stat. 490.

“The printed statute books of the United States, and of this State, and of the several States, of the territories, and late territories of the United States, purporting to be printed under the authority of said United States, any State or territory, shall be evidence in all courts and places in the State, of the acts therein contained. § 10.

“An exemplification by the Secretary of this State, of the laws of the other States and territories, which have been or shall hereafter be transmitted, by order of the executive or Legislatures of such other States or territories, to the governor of this State and by him deposited at the office of said secretary, shall be admissible as evidence in any court of this State.” § 11.

“The books of reports of decisions of the Supreme Court, and other courts of the United States, of this State, and of the several States and territories thereof, purporting to be published by authority, may be read as evidence of the decisions of such courts.” § 12.

“The papers, entries and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk.” § 13.

“The papers, entries, records and ordinances, or parts thereof,

of any city, village, town or country, may be proved by a copy thereof, certified under the hand of the clerk or the keeper thereof, and the corporate seal, if there be any, if not, under his hand and private seal." § 14.

"The papers, entries and records of any corporation or incorporated association may be proved by a copy thereof, certified under the hand of the secretary, clerk, cashier or other keeper of the same. If the corporation or incorporated association has a seal, the same shall be affixed to such certificate." § 15.

"The certificate of any such clerk of a court, city, village, town, county, or secretary, clerk, cashier, or other keeper of any such papers, entries, records or ordinances, shall contain a statement that such person is the keeper of the same, and if there is no seal, shall so state." § 16.

"The proceedings and judgments before justices of the peace may be proved by a certified copy thereof, under the hand and private seal of the justice before whom such proceeding or judgment is had, or his successor, having the custody of the same, when such certified copy is to be used as evidence in any county other than that in which the justice so certifying resides, the certificate of the county clerk shall be annexed certifying that the justice before whom the proceeding or judgment was had, was, at the time such proceeding or judgment was had, a justice of the peace, duly commissioned, and if the certificate is by a successor, that he was such successor at the time of making such certificate." § 17.

§ 140. **Judicial Records—Judgments—Verdicts—Writs, etc.**—Judicial documents may be divided into: First. Judgments, decrees and verdicts; Second. Depositions and inquisitions, taken in the course of legal proceedings. Third. Writs of summons, attachments, warrants, pleadings, complaints and answers, etc., which are incident to legal proceedings. With respect to judgments, decrees and verdicts, may be considered: First. Their admissibility and effects. Second. The means of proving them. Third. The mode of answering such evidence.

§ 141. **Statement of the English Rule Regarding the Effect and Introduction in Evidence of this Proof.**—"All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so affected is a fact or issue, or is deemed to be relevant to the issue."

This is the concise, crisp statement of Sir James Stephen (Digest, § 40), and correctly states the present attitude of juridicial comment on this subject. It is among the exceptions to the rule excluding hearsay evidence, and owes its vitality and force to the presumption, which the law indulges, that every court keeps a faithful record of its own proceedings, and that those proceedings are not only competent but conclusive evidence to prove that the proceedings therein recorded actually took place as therein recited, and that judgment was actually rendered as therein set forth.

Without such conclusive presumption of the correctness of judicial records, no judgment could ever be practically enforced, for it would always be in the power of any one interested to dispute its existence at any time, and this would involve a new investigation and a new trial which would be no more conclusive than the first. Of course it would be absurd to apply any test to that which the law conclusively assumes to be correct. As the record is conclusive evidence of the rendition of the judgment it follows, as a natural consequence, that it is also conclusive evidence of the existence of that result or state of things which the judgment necessarily effects.

But although the record is always conclusive proof of the rendition of the judgment therein recited, and of the result accomplished by it, it by no means follows that it is in all cases equally conclusive or even competent evidence to establish the correctness of the verdict of the jury, or the finding of matters of fact by the court upon which such judgment was predicated; for as it often happens that a tribunal, either from not having sufficient evidence before it, or from other causes may have arrived at a wrong decision as to the truth of the matters of fact submitted to it, such verdict can never amount to more than mere presumptive evidence of the truth of such matters. It will be seen that every record of a court of justice consists of two parts, which have been respectively denominated by Best, the Substantive and Judicial portion (Best, Ev. § 590). In the former the court records or attests its own proceedings and acts, and to this unerring veracity is attributed by the law, while the latter or judicial portion, by which the court expresses its judgments or opinions on the matter before it, is only conclusive or indeed competent as evidence, under certain circumstances which we shall now consider.

**a. The Presumptions Favor Validity of the Recitals in Public Documents.**—The presumptions are in favor of the



validity of a judgment of a court of general jurisdiction. *Reber v. Wright*, 68 Pa. 471; *Read v. Buffalo*, 4 Abb. App. Dec. 22; S. C. 3 Keyes, 447; *Drake v. Duvenick*, 45 Cal. 455. When the record is silent as to what was done, it will be presumed that what ought to have been done, was not only done, but rightly done. But when the record states what was done, it will not be presumed that something different was done. *Hahn v. Kelly*, 34 Cal. 407.

The plea of *nul tiel* record puts in issue the existence of the judgment (*Gorham v. Fisher*, 30 Vt. 200), and puts the plaintiff to the proof of a full record of judgment. *Wright v. Fletcher*, 12 Vt. 431; *Fitch v. Porter*, 8 Ired. L. 511. This plea raises an issue to be tried by a jury. *Bischoff v. Wethered*, 76 U. S. 9 Wall. 812, 19 L. ed. 829. *Nil debet* is an answer to an action on a judgment. *Indianapolis, B. & W. R. Co. v. Risley*, 50 Ind. 60.

Payment may be always pleaded to a judgment. *Gulick v. Loder*, 13 N. J. L. 68; *Cameron v. Fowler*, 5 Hill, 306. But *nul tiel* record and payment cannot both be pleaded. *Riley v. Riley*, 20 N. J. L. 114.

**b. Judgment may be Impeached for Fraud.**—A judgment may be impeached for fraud, and evidence is always pertinent in support of such an allegation. *Rogers v. Rogers*, 15 B. Mon. 364; *Whetstone v. Whetstone*, 31 Iowa, 276; *Cowin v. Toole*, 31 Iowa, 513; *Amory v. Amory*, 3 Biss. 266; *Davis v. Davis*, 61 Me. 395; *Coffee v. Neely*, 2 Heisk. 304; *Ward v. Quinlavin*, 57 Mo. 425; *Dobson v. Pearce*, 12 N. Y. 156.

**c. Also for Want of Jurisdiction.**—So a judgment rendered by a court not having jurisdiction of the parties and of the subject matter is void. *Dorsey v. Kendall*, 8 Bush, 294; *Starbuck v. Murray*, 5 Wend. 148; *Sears v. Terry*, 26 Conn. 273. A judgment pronounced by a tribunal having no authority to determine the matter in issue, is necessarily and incurably void and may be shown to be so in any collateral or other proceedings in which it is drawn in question. *Gilliland v. Sellers*, 2 Ohio St. 223; *Morse v. Presby*, 25 N. H. 299; *Eaton v. Badger*, 33 N. H. 228; *King v. Poole*, 36 Barb. 242; *Blair v. Cummings*, 39 Cal. 667; *Williamson v. Berry*, 49 U. S. 8 How. 495, 12 L. ed. 1170. See *Crepps v. Durden*, Cowp. 640, 1 Smith's Lead. Cas. 824. But if the judgment be one of a court of superior jurisdiction,

all the jurisdictional facts will be presumed in its favor. *Potter v. Merchants' Bank*, 28 N. Y. 656; *Wells v. Waterhouse*, 22 Me. 131; *Withers v. Patterson*, 27 Tex. 491; *Reynolds v. Stansbury*, 20 Ohio, 344; Freeman, Judgments, § 124. But this presumption extends only to those matters in reference to which the record is silent. If facts are stated from which a want of jurisdiction can be shown, the judgment is void. *Clark v. Thompson*, 47 Ill. 25; *Hahn v. Kelly*, 34 Cal. 391.

**d. Substantial Reenactment of the English Rule in the United States.**—These provisions are substantially enacted throughout the code States of the American Union, and the practitioner is referred in each instance to the statutory law of his own State, regulating this.

§ 142. **Article IV. of the Federal Constitution.**—The Federal Constitution provides, Art. 4, § 1: Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof. Const. U. S. Art. 4, § 1. Under this provision it has been enacted that “the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the attestation is in due form.” 1 Stat. at L. 122. And by a subsequent act, these provisions are extended to the courts of all territories subject to the jurisdiction of the United States. 2 Stat. at L. 298.

**a. Wide Diversity of Opinion as to Its Construction.**—A wide diversity of opinion has arisen in the construction of this constitutional provision, and of the statute. On the one hand, it has claimed that the Act of Congress only provided for the admission of such records as evidence, but in as much as a judgment rendered in a court not having competent jurisdiction is a nullity, it is always competent to inquire into the jurisdiction of the court in which the judgment offered in evidence was rendered, and for the purpose of such inquiry to contradict the record; and that such want of jurisdiction may be shown either as to the subject matter, or the person, or in proceedings *in rem* as to the thing. *Penny-*

*wit v. Foote*, 27 Ohio St. 600; *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Hoffman v. Hoffman*, 46 N. Y. 40, 7 Am. Rep. 299; *Bissell v. Briggs*, 9 Mass. 462; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Harris v. Hardeman*, 55 U. S. 14 How. 334, 14 L. ed. 444; *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; *Voorhees v. Jackson*, 35 U. S. 10 Pet. 475, 9 L. ed. 500; *Mackay v. Gordon*, 34 N. J. L. 286; Story, Const. § 1307; Story, Conf. of Laws, § 609; *Paine v. Mooreland*, 15 Ohio, 445; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

**b. Judicial Comment on the Question.**—On the contrary, it has been held that the act declared that the record duly authenticated shall have such faith and credit as it had in the State from whence it was taken; and therefore if in that State it had faith and credit of evidence of the highest nature, viz.: record evidence unimpeachable, it should have the same in every other State, and that therefore, where the record disclosed the jurisdictional facts, it could not be controverted in the tribunals of another State. *Zepp v. Hager*, 70 Ill. 223; *Crafts v. Clark*, 31 Iowa, 77; *Faber v. Hovey*, 117 Mass. 107, 19 Am. Rep. 398; *Carleton v. Bickford*, 13 Gray, 591; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Mills v. Duryee*, 11 U. S. 7 Cranch, 484, 3 L. ed. 412; 2 Am. Lead. Cas. 597; Freeman on Judgments, § 561; *Westcott v. Brown*, 13 Ind. 83; *Hall v. Williams*, 6 Pick. 232; *Shumway v. Stillman*, 6 Wend. 447.

**c. Extended Review of the Authorities.**—In so far as it is possible for the United States Supreme Court to place any question at rest, this one of constitutional interpretation has received its most luminous exposition and critical analysis in *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897.

*Mr. Justice Bradley*, voicing the sentiment of an undivided court, reaches the conclusion that: “Neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, or the Act of Congress passed in pursuance thereof prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

“The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that they did exist.

“Want of jurisdiction may be shown, either as to the subject matter or the person, or in proceedings *in rem* as to the thing.”

In connection with this constitutional provision, we have a supplementary Act of Congress passed the 26th of May, 1790 (Stat. at L. 122), which, after providing for the mode of authenticating the acts, records and judicial proceedings of the States, declares—

“And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.”

It has been supposed that this Act in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State in which they are rendered. And the language of this court in *Mills v. Duryee*, 11 U. S. 7 Cranch, 484, 3 L. ed. 412, seemed to give countenance to this idea. The court in that case held that the Act gave to the judgments of each State the same conclusive effect as records, in all the States, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another State. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. *Justice* Story, who pronounced the judgment in *Mills v. Duryee*, in his *Commentary on the Constitution*, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one State in every other State, adds: “But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it; or the right of the State itself to exercise authority over the person or the subject matter. The Constitution did not mean to confer (upon the States) a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction, over persons and things within their territory.” § 1313. In his *Commentary on the Conflict of Laws*, § 609, substantially the same remarks are repeated, with this addition: “It” (the Constitution) “did not make the judgments of other States domestic judgments to all intents and pur-

poses, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgment without a new suit in the tribunals of other States. And they enjoy not the right of property or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the State courts are referred to by *Justice Story* in support of this view. *Chancellor Kent* expresses the same doctrine in nearly the same words, in a note to his commentaries. (Vol. 1, p. 281.) "The doctrine in *Mills v. Duryee*," he says, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached either as to the subject matter, or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the cause, but of the parties, and in that case the judgment is final and conclusive." The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another State, to be valid, must deny, by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person or of the subject matter." See also 2 Kent, Com. 95, *Note*, and cases cited.

The opinion then proceeds with the further analysis of authorities, and in commenting on the analogous case of *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648, His Honor observed: "This was an action, in the Circuit Court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that State; that the constitutional provision and Act of Congress giving full faith, credit and effect to the judgments of each State in every other State do not refer to judgments rendered by a courts having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of retrying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to

the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only prima facie binding. But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or as (might have been added) in proceedings *in rem*, where the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction. 'The international law as it existed among the States in 1790,' say the court, 'was that a judgment rendered in one State, assuming to bind the person of a citizen of another State, was void within the foreign State, when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction nor that of courts of justice, had binding force.' Subject to this established principle, Congress also legislated; and the question is whether it was intended to overthrow this principle and to declare a new rule, which would bind the citizens of one State to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgment as they had in the States where made.

"In the subsequent case of *Webster v. Reid*, 52 U. S. 11 How. 437 [13 L. ed. 761], the plaintiff claimed by virtue of a sale made under judgments in behalf of one Johnson and one Brigham against 'The Owners of Half Breed Lands Lying in Lee County,' Iowa Territory, in pursuance of a law of the territory. The defendant offered to prove that no service had been made upon any persons in the suits in which the judgments were rendered, and no notice by publication as required by the act. The court held that, as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

"In *Harris v. Hardeman*, 55 U. S. 14 How. 334 [14 L. ed. 444], which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by *Mr. Justice Daniel* at some

length, and several cases in the State court were cited and approved which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of *Borden v. Fitch*, 15 Johns. 141, and *Starbuck v. Murray*, 5 Wend. 156; and from the latter the following remarks were quoted with apparent approval. 'But it is contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question at issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and therefore, the supposed record is, in truth, no record. The plaintiffs in effect, declare to the defendant, the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle.' The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in *D'Arcy v. Ketchum*, *supra*."

It is impossible to evade one very serious result of this reasoning. It is an embarrassment inherent in the case, and the distinguished jurist was in full appreciation of it when he says: "If it is once conceded that the validity of a judgment may be attacked collaterally by evidence, showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States, it is true, are held to import absolute verity, as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be

admitted to contradict the record. But as we have seen, that rule has no extraterritorial force."

The decision above cited was rendered in 1873. It was doubtless suggested and in part inspired by the position taken by the New York Court of Appeals two years earlier in *Hoffman v. Hoffman*, 46 N. Y. 30.

A husband procures a decree of divorce in the State of Indiana. Both parties have been residents of the State of New York. The wife was never served with process nor appeared in the action. And it was held that the record of such decree was not conclusive as to jurisdiction, but that the facts therein stated giving the court jurisdiction, might be disputed and disproved.

Judge Peckham expresses the conviction that the provision in question was never intended to prevent such inquiry. The constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the State. Story, Com. Const., *Mills v. Duryee*, 2 Am. Lead. Cas. 623, *Note*. He concludes by saying, "the necessary effect of sustaining this decree would be, to allow any other State substantially to make laws for this State: to regulate not only our domestic relations of husband and wife, but almost every other right.

A court has no authority to assume jurisdiction over a marriage contract than over any other subject, without due service of process or the appearance of the party defendant.

For further authority on this subject, see *Kerr v. Kerr*, 41 N. Y. 272; *People v. Dawell*, 25 Mich. 247; *Jardine v. Reichert*, 39 N. J. L. 165; *Pennywit v. Foote*, 27 Ohio St. 600; *Gilman v. Gilman*, 126 Mass. 26; *Cook v. Cook*, 56 Wis. 195.

**d. Views of Mr. Desty.**—The constitutional provision which we are considering (art. IV., sec. 1), has received very thorough treatment from Mr. Robert Desty in the second edition of his *Federal Constitution*, page 230. Without referring to the extended treatment of the entire article, a brief abstract is appended of that portion which seems to accommodate itself to the rules of evidence it is our province to consider. Mr. Desty says: "These terms point to the attributes and qualities which judicial proceedings and records shall have as evidence. *McElmoyle v. Cohen*, 38 U. S. 13 Pet. 312, 10 L. ed. 177; *Carter v. Bennett*, 6 Fla. 214; *Joice v. Scales*, 18 Ga. 725; *Brengle v. McClellan*, 7 Gill &



J. 434; *Shelton v. Johnson*, 4 Sneed, 672; *Wilson v. Robertson*, 1 Overton, 464. Records are all acts, legislative, executive, judicial and ministerial, which constitute the public records of the State (*White v. Burnley*, 61 U. S. 20 How. 250, 15 L. ed. 890; *Watrous v. McGrew*, 16 Tex. 509), and the object of the section is to declare that full faith and credit should be given to such, the manner of authenticating the same, and their effect when properly authenticated (*Green v. Sarmiento*, 1 Pet. C. C. 74; 3 Wash. C. C. 17); and to this end Congress has full power to legislate as to the effect of judicial proceedings in the courts of the States and Territories. *Hughes v. Davis*, 8 Md. 27; *Duwall v. Fearson*, 18 Md. 502. But see *Adams v. Way*, 33 Conn. 419; *Haggin v. Squires*, 2 Bibb, 334; *Seton v. Hanham*, R. M. Charl't. 374. Legislative Acts are to be authenticated by the seal of the State (*United States v. Johns*, 4 U. S. 4 Dall. 416, 1 L. ed. 889; 1 Wash. C. C. 363; *Craig v. Brown*, Pet. C. C. 354); which imports absolute verity (*United States v. Johns*, *supra*; *United States v. Amedy*, 24 U. S. 11 Wheat. 407, 6 L. ed. 506). The object of this clause was to preclude judgments from being disregarded in other States, when a proper tribunal with competent jurisdiction had rendered them (*People v. Dawell*, 25 Mich. 247), but only so far as they have jurisdiction (*D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648; *Board of Public Works v. Columbia College*, 84 U. S. 17 Wall. 521, 21 L. ed. 687), the record being subject to contradiction as to the facts necessary to give jurisdiction (*Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Pennywit v. Foote*, 27 Ohio St. 600), as where judgment was rendered against a citizen of another State not served with process, and who did not voluntarily appear. *D'Arcy v. Ketchum*, *supra*. The Constitution has effected no change in the nature of a judgment (*McElmoyle v. Cohen*, *supra*); it simply places judgments in another State on a different footing from what are commonly called foreign judgments, as to their force and effect. *Olden v. Hallet*, 5 N. J. L. 466; *Gibbons v. Livingston*, 6 N. J. L. 287; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23. A judgment in any State is to be regarded as a domestic judgment (*Baxley v. Linah*, 16 Pa. 247); but this clause relates only to judgments in civil actions, and not to judgments in criminal prosecutions (*Com. v. Green*, 17 Mass. 515), nor to decrees in divorce. *Hood v. State*, 56 Ind. 263; *Sewall v. Sewall*, 122 Mass. 156."

e. **Summary of the Cases Cited.**—Summarizing a very extended survey of this subject, which is one of extreme importance in the domain of evidence, we reach conclusions that are sustained by the weight of authority, but are by no means without contradiction in highly respectable quarters. The conclusion is, that any inquiry as to the jurisdictional capacity of the court is at all times relevant. That any evidence having a tendency to show the absence of jurisdiction is pertinent and that notwithstanding the apparent inhibition of the constitutional clause, full faith and credit is not to be interpreted as calling for a ruthless disregard of every element of justice, and the adoption through blind subserviency of whatever a juridical record cast in another State may seemingly import. This one question of jurisdiction is one, under the authorities, always open to review. As sustaining this proposition, with more or less implicitness, and as indicating the violent nature of the controversy on the subject, I subjoin an array of authority which, while perhaps formidable and unnecessary, for the purpose of indicating the rule, will be appreciated by a practitioner in any State as casting an illumination upon a very obscure and controverted point. *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Harris v. Hardeman*, 55 U. S. 14 How. 334, 14 L. ed. 444; *Borden v. Fitch*, 15 Johns. 141; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Elliott v. Peirsol*, 26 U. S. 1 Pet. 328, 7 L. ed. 164; *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; *Voorhees v. Jackson*, 35 U. S. 10 Pet. 475, 9 L. ed. 500; *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 222; *Mackay v. Gordon*, 34 N. J. L. 286; *Wilson v. Bank of Mt. Pleasant*, 6 Leigh, 570; *Spencer v. Brockway*, 1 Ohio, 261; *Goodrich v. Jenkins*, 6 Ohio, 41; *Anderson v. Anderson*, 8 Ohio, 108; *Paine v. Morland*, 15 Ohio, 445; *Hunt v. Hunt*, 72 N. Y. 217; *Kinnier v. Kinnier*, 45 N. Y. 535; *Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340; *Jardine v. Reichert*, 39 N. J. L. 165; *Guthrie v. Lowrie*, 84 Pa. 533; *Wright v. Andrews*, 130 Mass. 149; *Harvey v. Drew*, 82 Ill. 606; *Ferguson v. Crawford*, 70 N. Y. 253; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Kingsbury v. Yniestra*, 59 Ala. 320; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Kerr v. Kerr*, 41 N. Y. 272; *Thompson v. Emmert*, 15 Ill. 416; *Zepp v. Hager*, 70 Ill. 223; *Knowles v. Logansport Gaslight & C. Co.* 86 U. S. 19 Wall. 59, 22 L. ed. 70; *Starbuck v. Murray*, 5 Wend. 148; *Napton v. Leaton*, 71 Mo. 358; *Bofurtha v. Goodrich*, 3

Gray, 508; *McDermott v. Clay*, 107 Mass. 501; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432; *Easley v. McClinton*, 33 Tex. 288; *Finneran v. Leonard*, 7 Allen, 54; *Noyes v. Butler*, 6 Barb. 613; *Lawrence v. Jarvis*, 32 Ill. 304; *Rankin v. Goddard*, 54 Me. 28; *Carleton v. Bickford*, 13 Gray, 596; *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *People v. Darwell*, 25 Mich. 247, 12 Am. Rep. 260; *Shumway v. Stillman*, 4 Cow. 292; *Bartlet v. Knight*, 1 Mass. 408; *Shelton v. Tiffin*, 47 U. S. 6 How. 163, 12 L. ed. 387; *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414; *Webster v. Hunter*, 50 Iowa, 215; *Corby v. Wright*, 4 Mo. App. 443; *Noble v. Thompson Oil Co.* 79 Pa. 354; *Hill v. Mendenhall*, 88 U. S. 21 Wall. 453, 22 L. ed. 616; *Graham v. Spencer*, 14 Fed. Rep. 603; *Hall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Lowe v. Lowe*, 40 Iowa, 220; *Hall v. Williams*, 6 Pick. 232; *Woodward v. Tremere*, 6 Pick. 354; *Thurber v. Blackbourne*, 1 N. H. 248; *Aldrich v. Kinney*, 4 Conn. 380; *Holt v. Alloway*, 2 Blackf. 108; *Spencer v. Brockway*, 1 Ohio, 260; *Wood v. Wood*, 78 Ky. 624; *Board of Public Works v. Columbia College*, 84 U. S. 17 Wall. 521, 21 L. ed. 687; *Eager v. Stover*, 59 Mo. 87; *Clark v. Little*, 41 Iowa, 497; *Andrews v. Herriot*, 4 Cow. 524; *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648; *Hickey v. Stewart*, 44 U. S. 3 How. 762, 11 L. ed. 819; *Bank of United States v. Bank of Baltimore*, 7 Gill, 415; *Andrews v. Montgomery*, 19 Johns. 162; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Dobson v. Pearce*, 12 N. Y. 164; *Newell v. Newton*, 10 Pick. 472; *Morey v. Morey*, 27 Minn. 265; *O'Rourke v. Chicago, M. & St. P. R. Co.* 55 Iowa, 332; *Wood v. Wood*, 78 Ky. 624; *Whorton v. Moragne*, 62 Ala. 201; *Webster v. Hunter*, 50 Iowa, 215; *Gilchrist v. West Virginia, O. & O. L. Co.* 21 W. Va. 115; *Healy v. Root*, 11 Pick. 390; *McRae v. Mattoon*, 13 Pick. 58; *Adams v. Rowe*, 11 Me. 95; *Hall v. Williams*, 10 Me. 283; *Whittier v. Wendell*, 7 N. H. 257; *Wernwag v. Pawling*, 5 Gill & J. 500; *Den v. Wharton*, 1 Yerg. 125; *Rogers v. Coleman*, Hard. (Ky.) 413; *Rust v. Frothingham*, 1 Ill. 259; *Miller v. Miller*, 1 Bail. L. 244; *Mitchell v. Ferris*, 5 Del. 34; *Redus v. Burnett*, 59 Tex. 576.

**f. Further Consideration of this Subject Reserved.**—This subject is reserved for further consideration under the title of *Res Adjudicata*, *post*.

### § 143. Judgments in Their Relation to Evidence.

a. **An Erroneous and Misleading View.**—Mr. Freeman is authority for the assertion that a judgment can be nothing less than conclusive evidence. The full context of the section which is supposed to sustain this proposition, is as follows: "It is important to be observed in this connection that a judgment, when offered as evidence in a subsequent litigation, is either conclusive evidence, suffering no contradiction, or it is of no effect at all; and it is not admissible as evidence of the matters on which it is based, except where it is conclusive, that is to say, it can never be admissible as tending to prove a given fact, for if it is offered as against a stranger to the former litigation, it is not admissible at all, and if against a party or privy, it is conclusive."

The learned author in support of this somewhat sweeping proposition cites the case of *Bethlehem v. Watertown*, 51 Conn. 490. A critical examination of that case shows that it sustains this proposition, but it is against the entire current of modern adjudication and must be regarded as announcing a proposition utterly at variance with many well-considered cases.

b. **An Important Distinction Outlined.**—*Stephens v. Fox*, 83 N. Y. 313 (opinion by Miller, J.) outlines the distinction that seems to have escaped Mr. Freeman's notice, *i. e.*, "A judgment is prima facie evidence, but is always open to impeachment for jurisdictional defects—for collusive entry or active fraud of any description. The general rule undoubtedly is that it is conclusive as between parties and privies." *Corse v. Sanford*, 14 Iowa, 235; *Grund v. Tucker*, 5 Kan. 70; *Squires v. Brown*, 22 How. Pr. 35.

There is one important distinction of vital importance in considering the principle cited in the preceding paragraph. That is this: The presumption in favor of the validity of a judgment does not extend to a case of personal service on a defendant where the evidence does not show whether or not the service is made within the State. The subject is involved in some obscurity, and has seldom been the topic of adjudication; but very recent decision by courts of conspicuous ability abundantly establishes the proposition that a judgment is the subject of a direct attack by the defendant, in cases where he seeks to show a jurisdictional defect by reason of the failure of personal service upon him, he claiming to be a nonresident of the State from which the process emanated. *Rand v. Hanson*. (Mass.) 12 L. R. A. 574.

The distinction sought to be established is this: A valid judgment may be obtained against the thing, but not against the person, in case the person is beyond the jurisdiction of the court. *Eliot v. McCormick*, 3 New Eng. Rep. 871, 144 Mass. 10; *Nedham v. Thayer*, 147 Mass. 536; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Eaton v. Badger*, 33 N. H. 228.

The pith and marrow of the contention reduces itself to this: Where the record shows the defendant was a non-resident there is no presumption of personal service; the validity of the judgment is only assumed in cases where it appears that the court had jurisdiction of the person. *Downer v. Shaw*, 22 N. H. 277; *Morse v. Presby*, 25 N. H. 299; *Galpin v. Page*, 85 U. S. 18 Wall. 350, 22 L. ed. 959.

**c. Views of Mr. Justice Woodruff.**—*Mr. Justice Woodruff*, in *Squires v. Brown*, 22 How. Pr. 35, employs language that best expresses the juridical dissent from Mr. Freeman's proposition: "The decision of this court in *Belmont v. Coleman*, 1 Bosw. 188, is to the effect that where stockholders are sought to be charged in a like case, a judgment against the corporation is complete evidence to prove the indebtedness. In that case the authorities bearing on the question are collected and reviewed, and that decision must be taken to dispose of the question in the present case. If competent as against the stockholders of a corporation, much more should it be held competent as against the trustees to whom the management of its affairs is confided. It is sufficient to say that it was prima facie evidence of the indebtedness; and if it be conceded that it was not conclusive, and might be overcome by proof that it was obtained by fraud or collusion, or by proof that no such indebtedness in fact existed, still it was not erroneous to receive it in evidence when offered.

**d. Fluctuations of the Decisions.**—Both cases referred to in the text are New York decisions, and have been subjected to very rigid scrutiny. The question they involve underwent violent fluctuation. *Chancellor Kent*, in *Slee v. Bloom*, 20 Johns. 669, held that the judgment, although binding upon the company in its corporate capacity, was not upon the defendants when the statute liability was sought to be enforced; and that the acts of the trustees of the individual stockholders were not binding upon them. In the court of errors this decision was reversed, and in the opinion of *Ch. J. Spencer*, which is the only one given in

that court, the ground is maintained that the defendants were chargeable with the debt, on the principle that the trustees, as the agents of the stockholders, had contracted the debt and fixed the liability, and that the latter could impeach the consideration of the indebtedness upon no other ground than that of fraud or error in the liquidation; nor could this be done without laying a proper foundation for it in the pleadings. "We must regard the judgment," he says, "as a solemn admission of indebtedness; but it is not binding as *res adjudicata* upon the stockholders if it was procured by fraud, or is founded in error."

"A judgment obtained against the corporation is certainly conclusive (until reversed for error or impeached for fraud) in a suit to charge the stockholders upon their unpaid stock subscriptions; and by analogy it should also be held conclusive in a suit to charge them upon their individual liability to creditors." Morawetz on Private Corporations, § 619, citing *Donworth v. Coolbaugh*, 5 Iowa, 300; *Milliken v. Whitehouse*, 49 Me. 527; *Cane v. Brigham*, 39 Me. 35; *Slee v. Bloom*, *supra*. Compare also *Stephens v. Fox*, 83 N. Y. 313; *Wilson v. Stockholders of Pittsburgh & Y. Coal Co.* 43 Pa. 424. See as to the construction of N. Y. Statute, *Moss v. McCullough*, 5 Hill, 131; *McMahon v. Macy*, 51 N. Y. 155; *Miller v. White*, 50 N. Y. 137, these authorities being in some respects inconsistent with the above. See, also, *Grund v. Tucker*, 5 Kan. 70; *Coalfield Co. v. Peck*, 98 Ill. 139; *Bronson v. Wilmington N. C. L. Ins. Co.* 85 N. C. 411; *Weber v. Fickey*, 52 Md. 500.

e. **Mr. Black's Extended Review of Authority.**—Mr. Black, in a very recent work on the Law of Judgments (1891), referring to the admission of parol evidence, says: "It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial,"—citing *Ricardo v. Garcias*, 12 Clark & F. 368; *Langmead v. Maple*, 18 C. B. N. S. 255; *Aspden v. Nixon*, 45 U. S. 4 How. 467, 11 L. ed. 1059; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Wilson v. Deen*, 121 U. S. 525, 30 L. ed. 980; *Dunlap v. Glidden*, 34 Me. 517; *King v. Chase*, 15 N. H. 9; *Aiken v. Peck*, 22 Vt. 255; *Post v. Smilie*, 48 Vt. 185; *Gage v. Holmes*, 12 Gray, 428; *Burten v. Shannon*, 99

Mass. 200; *Hood v. Hood*, 110 Mass. 463; *Supples v. Cannon*, 44 Conn. 424; *Snider v. Croy*, 2 Johns. 227; *Stowell v. Chamberlain*, 3 Thomp. & C. 374; *Tams v. Lewis*, 42 Pa. 406; *Hughes v. Jones*, 2 Md. Ch. 178; *Whitchurst v. Rogers*, 38 Md. 503; *Gist v. McJunkin*, 1 Speer, L. 158; *Newton Mfg. Co. v. White*, 47 Ga. 400; *Rake v. Pope*, 7 Ala. 161; *Robinson v. Lane*, 14 Smedes & M. 161; *Foster v. Wells*, 4 Tex. 101; *Gates v. Bennett*, 33 Ark. 475; *Bottorff v. Wise*, 53 Ind. 32; *Barger v. Hobbs*, 67 Ill. 592; *George v. Gillespie*, 1 G. Greene, 421; *Amsden v. Dubuque & S. C. R. Co.* 32 Iowa, 288; *Sweet v. Maupin*, 65 Mo. 65; *Driscoll v. Damp*, 18 Wis. 106.

**f. An Exposition by Mr. Justice Field.**—In the case of *Russell v. Place*, *supra*, it was said by Field J.: “It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record,—as for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.” And in *Hickerson v. City of Mexico*, 58 Mo. 61, the rules on the subject are thus summarized: “It is undoubtedly true that in some of the earlier cases, it was decided that a judgment was conclusive as to all facts arising upon the record which were or might have been passed upon. But it is now generally if not universally conceded that parol evidence may be received for the purpose of showing whether a question was determined in a former suit. The record may first be put in evidence and then it may be followed by such parol evidence as may be necessary to give it effect, or show on what issue it was grounded. When a number of issues are presented, the finding in any one of which will warrant

the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues. In order to show by evidence aliunde that the matter is *res adjudicata*, it must appear not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination. If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit. Where matters could have been proved in the former action, the presumption is that they were proved, but this presumption may be rebutted and overthrown."

**g. Well Defined Modifications of the Earlier Rule.**—A well defined modification of the ancient rule is clearly disclosed by a careful scrutiny of the authorities. The judicial record must show that the same subject matter might have been litigated on the former trial and the fact that it did come in question and was litigated may be shown by extrinsic proof. *Young v. Rummell*, 2 Hill, 478. "If it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined." *Chrisman v. Harman*, 29 Gratt. 494, 26 Am. Rep. 387; *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214; *Clark v. Blair*, 14 Fed. Rep. 812; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 722; *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8.

According to Coke, an estoppel must be certain to every intent; and if, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. The record is conclusive evidence that the judgment was rendered upon some one or more of the issues legitimately raised by the pleadings of the parties. The parol proof is only to distinguish which of those several issues were decided, or to show that some particular fact was decided in the determination of some of those issues. *Jones v. Perkins*, 54 Me. 393. See also *Manny v. Harris*, 2 Johns. 24, 3 Am. Dec. 386.

Of similar import is the utterance of the New York Court of Appeals. The rule is well established, is not elementary, that a party insisting upon a former recovery must show that the record



of the former suit includes the matters alleged to have been determined. This is true in all cases in courts of record, whether the pleadings between the parties in the previous suit are general or special in their character. *Campbell v. Butts*, 3 N. Y. 173.

**h. Exception Recognized by Chief Justice Helm.**—Few postulates of the law of evidence are entirely beyond the influence of exception and *Mr. Chief Justice Helm* in a recent Colorado decision has expressed an exception that at rare intervals obtrudes itself in an exhaustive discussion of this subject. "The general rule, that judgments and decrees are inadmissible in evidence, except in suit between parties and privies thereto, is not applicable to the objection, arising as it does in the case before us." It was said by *Mr. Justice Story*, in a case where this question arose under similar circumstances, that "to reject the proof of the decree would be, in effect, to declare that no title derived under a decree in chancery was of any validity, except in a suit between parties and privies, so that in a suit by or against a stranger it would be a mere nullity. It might with as much propriety be argued that plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alia acta*." *Wells v. Francis*, 7 Colo. 396. See also *Coursin v. Pennsylvania Ins. Co.* 46 Pa. 329; *Casler v. Shipman*, 35 N. Y. 533; *Prince v. Griffin*, 16 Iowa, 555; *Koogler v. Huffman*, 1 McCord, L. 495.

**i. What Evidence is Competent.**—To identify the points decided in the litigation any evidence calculated from its nature and scope to elucidate the question is competent, and persons who were present at the trial may testify as to the issues passed upon. *Briggs v. Wells*, 12 Barb. 567. Occasionally the uncertainties disclosed by the record may be relieved by statements or admissions of the respective counsel, and that the actual facts adjudicated in the previous determination may be thus disclosed is settled by authority. *Merchants Int. S. B. Line v. Lyon*, 12 Fed. Rep. 63. The absolute invulnerability of probate decrees has between the parties and privies until reversed, modified or limited the effect of a final judgment, and this is abundantly settled by an uninterrupted line of decision. Assuming jurisdictional capacity to have been shown, or the presumption of it, these probate decrees admittedly constitute a high order of evidence and usually establish for all the purposes of the trial whatever may be fairly implied from the language of their recitals. *Caujolle v. Curtis*, 80 U. S.

13 Wall. 465, 20 L. ed. 507; *Simpson v. Norton*, 45 Me. 281; *Bryant v. Allen*, 6 N. H. 116; *Spofford v. Smith*, 59 N. H. 366; *Simmons v. Goodell*, 1 New Eng. Rep. 839, 63 N. H. 458; *Adams v. Adams*, 22 Vt. 50; *Lawrence v. Englesby*, 24 Vt. 42; *Jennison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258; *Paine v. Stone*, 10 Pick. 75; *Sever v. Russell*, 4 Cush. 513, 50 Am. Dec. 811; *Crippen v. Dexter*, 13 Gray, 330; *Cummings v. Cummings*, 123 Mass. 270; *Bush v. Sheldon*, 1 Day, 170; *Goodrich v. Thompson*, 4 Day, 215; *Gates v. Treat*, 17 Conn. 388; *Dickinson v. Hayes*, 31 Conn. 417; *Blake v. Butler*, 10 R. I. 133; *Roach v. Martin*, 1 Harr. (Del.) 548, 28 Am. Dec. 746; *Seymour v. Seymour*, 4 Johns. Ch. 409, 1 L. ed. 885; *Chipman v. Montgomery*, 63 N. Y. 236; *Harris v. Colquit*, 44 Ga. 663; *Davie v. McDaniel*, 47 Ga. 195; *King v. Smith*, 15 Ala. 264; *Herbert v. Hanrick*, 16 Ala. 581; *Arnett v. Arnett*, 33 Ala. 273; *Duckworth v. Duckworth*, 35 Ala. 70; *Hutton v. Williams*, 60 Ala. 107; *Turner v. Malone*, 24 S. C. 398; *Bailey v. Dilworth*, 10 Smedes & M. 404, 48 Am. Dec. 760; *Fort v. Battle*, 13 Smedes & M. 133; *McKee v. Whitten*, 25 Miss. 31; *Ward v. State*, 40 Miss. 108; *Womack v. Womack*, 23 La. Ann. 351; *Dooley v. Dooley*, 14 Ark. 122; *Osborne v. Graham*, 30 Ark. 67; *Gordon v. Kennedy*, 36 Iowa, 167; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Sheetz v. Kirtley*, 62 Mo. 417; *Dayton v. Mintzer*, 22 Minn. 393; *Garwood v. Garwood*, 29 Cal. 514; *Kingsley v. Miller*, 45 Cal. 95; *Reynolds v. Brumagin*, 54 Cal. 254.

A judgment for or against the ancestor is competent evidence for or against the heir, in actions relating to the inheritance. *Lock v. Norborne*, 3 Mod. 142; Freeman on Judgments, § 168.

A judgment for or against an executor or administrator is not conclusive against the heirs or devisees; nor is a judgment against the heir or devisee conclusive against the executor or administrator. *Dale v. Rosevelt*, 1 Paige, 35, 2 L. ed. 552; *McCoy v. Nichols*, 4 How. (Miss.) 31; *Vernon v. Valk*, 2 Hill Ch. 257; *Collinson v. Owens*, 6 Gill. & J. 4; *Robertson v. Wright*, 17 Gratt. 534; *Early v. Garland*, 13 Gratt. 1; *Stewart v. Montgomery*, 23 Pa. 410; *Dorr v. Stockdale*, 19 Iowa, 269; *Combs v. Tarlton*, 2 Dana, 465.

A judgment or verdict against the executor or administrator is not even competent evidence against the heir or devisee of the debt, or other facts established thereby. A judgment for or against the heir does not bind the devisees, nor conversely. *Kent*

v. *Kent*, 62 N. Y. 560, and cases cited; *Robertson v. Wright*, 17 Gratt. 534; *Laidley v. Kline*, 8 W. Va. 218, 230. *Contra*, *Cowart v. Williams*, 34 Ga. 167.

A judgment or verdict against one individual does not estop him as trustee (*Rathbone v. Hooney*, 58 N. Y. 463); but an adjudication against him as trustee estops him in respect to his private right as a *cestui que trust* held at the time of the former action, or acquired from persons then holding it. *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 741, 745, 24 L. ed. 190, 191.

**j. Fraud and Lack of Jurisdiction as Defenses.**—The jurisdiction of the court by which judgment is rendered in any State may be questioned in a collateral proceeding in another State notwithstanding the provision of the fourth article of the Constitution and the Law of 1790, and notwithstanding the averments contained in the record of the judgment itself. *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gaslight & C. Co.* 86 U. S. 19 Wall. 58, 22 L. ed. 70.

Fraud in obtaining judgment in another State is a good defense to such judgment, such as decoying defendant into State to obtain service upon him. *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Luckenbach v. Anderson*, 47 Pa. 123; *Jackson v. Jackson*, 1 Johns. 424; *Borden v. Fitch*, 15 Johns. 421; *Buford v. Buford*, 4 Munf. 241.

A court will not enforce a judgment of the courts of another State obtained by fraud. *Davis v. Headley*, 22 N. J. Eq. 115.

#### § 144. Evidence of Official Returns.

**a. Every Intendment Indulged in Their Favor.**—The law indulges every intendment in favor of an official return and to maintain and uphold the sufficiency and legality of such documents, it repels every attempt at criticism, and nothing short of conclusive evidence of its invalidity can result in its nullification as an official act. No blemish in the language or informity in the acknowledgment is sufficient to invalidate. Every favorable inference is seized upon to uphold its authority, and a construction is always adopted that will harmonize with the well known hypothesis of the law, "that an officer always performs his entire duty." *Franklin Bank v. Blossom*, 23 Me. 546; *Bacon v. Bevan*, 44 Miss. 293; *Cogswell v. Warren*, 1 Curt. 223; *Whittlesey v. Starr*, 8 Conn. 134.

The admissibility of a return as evidence, depends upon the

fact that it is duly filed, as, upon filing, it becomes part and parcel of the record in the case. *Ferguson v. Tutt*, 8 Kan. 377; *Pigot v. Davis*, 3 Hawks, 25; *Gardner v. Hosmer*, 6 Mass. 325; *Whiting v. Bradley*, 2 N. H. 81.

**b. Rule as to Their Admissibility.**—Generally it may be assumed that whenever an execution can be placed in evidence the return may also be admitted, and may operate as at least prima facie evidence of all the facts therein set forth, and which it was the officer's duty to embody in his return. These facts must be confined to things done by himself. The return is a history of his proceedings, not of the proceedings and acts of other persons. He is not the accredited historian of their acts, and if he undertakes this duty in his return, what he says is unofficial, and is not competent evidence for or against anyone. *Freem. Executions*, § 363, citing *Lothrop v. Abbott*, 16 Me. 421; *Polley v. Lenox Iron Works*, 4 Allen, 329; *Ufford v. Dickinson*, 12 Allen, 543; *Cowls v. Hastings*, 9 Met. 476; *Pigot v. Davis*, 3 Hawks, 25; *Piatt v. Piatt*, 9 Ohio, 37; *Nichol v. Ridley*, 5 Yerg. 63, 26 Am. Dec. 254; *Stanton v. Hodges*, 6 Vt. 64; *Day v. Roberts*, 8 Vt. 413.

There is no provision for a return showing the acts of anyone but the officer. A statement in the return purporting to show the acts of any one other than the officer, is without authority of law, and surplusage. *Aultman v. McGrady*, 58 Iowa, 118.

Where the evidence unequivocally shows the falsity of the official return, it is still to be regarded as invulnerable and controlling, until set aside by the proper authority. So long as it remains unvacated, it is not assailable, nor even open to collateral attack. *Stewart v. Stewart*, 27 W. Va. 167; *Kirksey v. Bates*, 1 Ala. 303; *Newton v. State Bank*, 14 Ark. 9, 58 Am. Dec. 363; *Fry v. Gallaspie*, 61 Ind. 478; *Brown v. Way*, 28 Ga. 531; *Rivard v. Gardner*, 39 Ill. 125; *Hamilton v. Matlock*, 5 Blackf. 421; *Smith v. Hornback*, 3 A. K. Marsh. 392; *Small v. Hodgen*, 1 Litt. 16; *McConnell v. Bowdry*, 4 T. B. Mon. 392; *Stinson v. Snow*, 10 Me. 263, 25 Am. Dec. 238; *Tyler v. Smith*, 8 Met. 599; *Dooley v. Wolcott*, 4 Allen, 406; *Campbell v. Webster*, 15 Gray, 28; *Tullis v. Brawley*, 3 Minn. 277; *Hallowell v. Page*, 24 Mo. 590; *Clough v. Monroe*, 34 N. H. 381; *State v. Ackerson*, 25 N. J. L. 209; *Allen v. Martin*, 10 Wend. 300; *Bank of Gallipolis v. Domigan*, 12 Ohio, 220, 40 Am. Dec. 475; *Pratt v. Phillips*, 1 Sneed, 543, 60 Am. Dec. 162; *Hill v. Grant*, 49 Pa. 200; *Rice*

*v. Groff*, 58 Pa. 116; *O'Conner v. Silver*, 26 Tex. 606; *Wood v. Doane*, 20 Vt. 612; *Gardner v. Cover*, 1 Gale, 45; *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278; *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429; *McDonald v. Leewright*, 31 Mo. 29, 77 Am. Dec. 631; *Irvin v. Smith*, 66 Wis. 113; *Hunt v. Weiner*, 39 Ark. 70; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Walters v. Moore*, 90 N. C. 41; *Miller v. United States*, 78 U. S. 11 Wall. 294, 20 L. ed. 141; *Brown v. Kennedy*, 82 U. S. 15 Wall. 597, 21 L. ed. 193.

**c. When Ambiguous or Uncertain in Phraseology Parol Evidence Admissible to Explain.**—The general principles applicable to all rules of evidence allow a return, ambiguous or uncertain in its phraseology, to be explained by parol evidence. *Wyer v. Andrews*, 13 Me. 168, 29 Am. Dec. 497; *Doe v. Snyder*, 3 How. (Miss.) 66; *Benjamin v. Hathaway*, 3 Conn. 528; *Martin v. Barney*, 20 Ala. 369.

**d. Conclusive as to Facts Stated until Vacated.**—Notwithstanding some decisions, the weight of authority clearly is, that an official return, duly made upon process by a sworn officer, in relation to facts which it is his duty to state in it, as between the parties and privies to the suit, and others whose rights are necessarily dependent upon it, conclusive as to the facts stated therein until vacated or set aside by due course of law; and that as to all other persons, such return is prima facie evidence only of the facts stated in it, and subject to be disposed. Cow. & H. notes to Phil. Ev., Nos. 383–385; Gwynne, Sheriffs, 473 *et seq.*, and cases cited; *Hill v. Kling*, 4 Ohio, 137; *Angier v. Ash*, 26 N. H. 105; *Diller v. Roberts*, 13 Serg. & R. 60, 15 Am. Dec. 578; *Bott v. Burnell*, 11 Mass. 165; *Whitaker v. Sumner*, 7 Pick. 555, 19 Am. Dec. 298; *Barrett v. Copeland*, 18 Vt. 69, 44 Am. Dec. 362; *Wilson v. Hurst*, 1 Pet. C. C. 441; *Bruce v. Holden*, 21 Pick. 189, 190; *Serrecolt v. Hampson*, Lofft, 372.

It is said in some of the elementary treatises that parties and privies are concluded by such return; but a careful consideration of the cases, as well as the reason of the rule, will confine it to those whose privity is such as entitle them to have the return set aside, or to maintain an action against the officer for a false return. And upon principle, certainly, none others should be concluded by it. In *Witherell v. Goss*, 26 Vt. 750, Isham, J., in considering this rule remarks: "The true principle governing

the case, we apprehend, is this: 'Wherever there is sufficient privity to enable a party to sustain an action against an officer for a false return, that return is conclusive in the proceedings under which it was made, and the party injured was driven to his action against the officer; but as to third persons, where no such privity exists, and no such action can be sustained, the return is not conclusive.'" *Phillips v. Elwell*, 14 Ohio St. 244, 84 Am. Dec. 373.

The greater portion of the authorities may be reconciled with each other; and the general principle which seems to be fairly deducible from them is, that between the parties to the suit, and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit as bail and indorsers, the return of the sheriff of matters material to be returned, is so far conclusive evidence that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them. But such return is not conclusive as to third persons whose interests are not connected with the suit, but may be affected by the proceedings of the sheriff, nor as to collateral facts, nor matters not necessary or proper to be returned. Should the sheriff return that the property attached was at the time the property of the debtor, this would not preclude a third person from showing a good title to it for both reasons. *Brown v. Davis*, 9 N. H. 82; *Claygett v. Richards*, 45 N. H. 363; *Freem. Executions* (2d ed.) § 364.

**e. Return of "Nulla Bona" Prima Facie Proof of Insolvency.**—An execution duly returned by the sheriff or his deputies with the indorsement thereon of *nulla bona* is admissible in evidence as prima facie proof of insolvency. *Phillips v. Webster*, 85 Ill. 146; *Brown v. Brooks*, 25 Pa. 210; *Buttram v. Jackson*, 32 Ga. 409.

**f. Return Cannot be Collaterally Impeached.**—As against the officer and those claiming in privity with him, his return is conclusive as to his acts stated in it, within the scope of his duty, as evidence in favor of the parties who claim an interest or right under the return, nor can it be collaterally impeached, even if the officer is shown to have been guilty of fraud and collusion. *Williams v. Lowndes*, 1 Hall, 579; *Sheldon v. Payne*, 7 N. Y. 453; *Splahn v. Gillespie*, 48 Ind. 397; *Armstrong v. Garrow*, 6 Cow. 465; *Baker v. McDuffie*, 23 Wend. 289; *Elder v. Cozart*, 59

Ga. 199; *Rowell v. Klein*, 44 Ind. 290; *Davant v. Carlton*, 57 Ga. 439; *Fitzgerald v. Kimball*, 86 Ill. 396; *State v. O'Neill*, 4 Mo. App. 221; *Shaw v. Simpson*, 1 Ld. Raym. 184; *Hamilton v. Matlock*, 5 Blackf. 421; *Remington v. Henry*, 6 Blackf. 63; *Burger v. Becket*, 6 Blackf. 61; *Dodge v. Farnsworth*, 19 Me. 278; *Huntress v. Tiney*, 39 Me. 237; *Bunker v. Gilmore*, 40 Me. 88; *Lothrop v. Abbott*, 16 Me. 421; *Bamford v. Melvin*, 7 Me. 14; *Holmes v. Baldwin*, 17 Me. 398; *Stinson v. Snow*, 10 Me. 263; *Grover v. Howard*, 31 Me. 546; *Bank of Newbury v. Eastman*, 44 N. H. 431; *Brown v. Davis*, 9 N. H. 76; *Chase v. Hazelton*, 7 N. H. 171; *Lewis v. Blair*, 1 N. H. 68; *Whiting v. Bradley*, 2 N. H. 79; *Sias v. Badger*, 6 N. H. 393; *Angier v. Ash*, 26 N. H. 99; *Wendell v. Mugridge*, 19 N. H. 109; *Messer v. Bailey*, 31 N. H. 9; *Clough v. Monroe*, 34 N. H. 381; *Ladd v. Wiggin*, 35 N. H. 421; *Bolles v. Bowen*, 45 N. H. 125; *Smith v. Noe*, 30 Ind. 117; *Stoors v. Kelsey*, 2 Paige, 418, 2 L. ed. 970; *Cozine v. Walter*, 55 N. Y. 304; *Allen v. Martin*, 10 Wend. 300; *Boomer v. Laine*, 10 Wend. 525; *Case v. Redfield*, 7 Wend. 398; *McArthur v. Pease*, 46 Barb. 423; *Egery v. Buchanan*, 5 Cal. 56; *Campbell v. Webster*, 15 Gray, 28; *Bott v. Burnell*, 11 Mass. 163; *Whitaker v. Sumner*, 7 Pick. 551; *Lawrence v. Pond*, 17 Mass. 433; *Slayton v. Chester*, 4 Mass. 478; *Eastabrook v. Hapgood*, 10 Mass. 313; *Bean v. Parker*, 17 Mass. 591; *Boston v. Tileston*, 11 Mass. 468; *Boynton v. Willard*, 10 Pick. 169; *Fenwick v. Fenwick*, 2 W. Bl. 788; *Gardner v. Cover*, 1 Gale, 45; *Carlile v. Parkins*, 3 Stark. 163; *Anon. Lofft*, 372; *Phillips v. Elwell*, 14 Ohio St. 240; *Hill v. Kling*, 4 Ohio, 135; *Burr v. Moody*, Wright, 449; *Carr v. Racine Commercial Bank*, 16 Wis. 51; *Paxson's App.* 49 Pa. 195; *Hill v. Grant*, 49 Pa. 200; *Rice v. Groff*, 58 Pa. 116; *Susquehanna Boom Co. v. Finney*, 58 Pa. 200; *Ayres v. Duprey*, 27 Tex. 593; *O'Conner v. Silver*, 26 Tex. 606; *Stewart v. Stringer*, 41 Mo. 400; *Reeves v. Reeves*, 33 Mo. 28; *McDonald v. Leewright*, 31 Mo. 29; *Hallowell v. Page*, 24 Mo. 590; *Boyd v. Murray*, Phil. Eq. 238; *Barrett v. Copeland*, 18 Vt. 67; *Wood v. Doune*, 20 Vt. 612; *Stevens v. Brown*, 3 Vt. 420; *Witherell v. Goss*, 26 Vt. 748; *White River Bank v. Downer*, 29 Vt. 332; *Smith v. Hornback*, 3 A. K. Marsh. 392; *Wilson v. Hurst*, 1 Pet. C. C. 441; *Diller v. Roberts*, 13 Serg. & R. 60; *Tullis v. Brawley*, 3 Minn. 277; *Folsom v. Carli*, 5 Minn. 333; *Rohrer v. Turrill*, 4 Minn. 407; *Morford v. Thomas*, Sneed (Ky.) 251; *Haynes v. Wheat*, 9 Ala. 239; *Kirksey v. Bates*, 1 Ala. 303; *Martin v. Bar-*

ney, 20 Ala. 369; *McBee v. State*, Meigs, 122; *Sawyer v. Curtis*, 2 Ashm. 127; *Mentz v. Hamman*, 5 Whart. 150; *Sample v. Coulson*, 9 Watts & S. 62; *Houser v. Hampton*, 7 Ired. L. 333; *Ringgold v. Edwards*, 7 Ark. 86; *Humphries v. Lawson*, 7 Ark. 341; *Newton v. State Bank*, 14 Ark. 9; *Doe v. Ingersoll*, 11 Smedes & M. 249; *Shotwell v. Hamblin*, 23 Miss. 156; *Trigg v. Lewis*, 3 Litt. 129; *Small v. Hodgen*, 1 Litt. 15; *Allender v. Riston*, 2 Gill & J. 86; *Phillips v. Demoss*, 14 Ill. 410; *Bowen v. Parkhurst*, 24 Ill. 257; *State v. Ackerson*, 25 N. J. L. 209; *Pratt v. Phillips*, 1 Sneed (Tenn.) 543.

This is true of a deputy's return as against the sheriff. *Barrett v. Copeland*, 18 Vt. 69; *Haynes v. Small*, 22 Me. 14; *Gardner v. Hosmer*, 6 Mass. 327; *Purrrington v. Loring*, 7 Mass. 392; *Paxton v. Steckel*, 2 Pa. 93; *Doty v. Turner*, 8 Johns. 20; *Townsend v. Olin*, 5 Wend. 207.

When the return is thus conclusive, neither the officer nor his deputy can dispute it. He is intrusted by law with the performance of a duty of which a record has been made, and it imports absolute verity. *Freem. Execution*, § 364, note 3: *McMicken v. Com.* 58 Pa. 213; *Cluley v. Lockhart*, 59 Pa. 376; *Welsh v. Bell*, 32 Pa. 12; *Trigg v. Lewis*, 3 Litt. 129; *Mildmay v. Smith*, 2 Saund. 343; *Murrell v. Smith*, 3 Dana, 463; *Wells v. Bennefield*, Wright, 201; *Butler v. State*, 20 Ind. 169; *Haynes v. Small*, 22 Me. 14; *Huntress v. Tiney*, 39 Me. 237; *Cowan v. Wheeler*, 31 Me. 439; *Wyer v. Andrews*, 13 Me. 168; *Lawson v. Main*, 4 Ark. 184; *Com. v. Fuqua*, 3 Litt. 41; *Phelps v. Parks*, 4 Vt. 488; *Blue v. Com.* 2 J. J. Marsh. 26; *Martin v. Barney*, 20 Ala. 369.

**g. Parties Interested may Obtain Leave to Amend.**—If the return is incorrect, leave must be obtained to amend it, which the court may grant on proper terms. *Henry v. Stone*, 2 Rand. 455; *People v. Ames*, 35 N. Y. 482; *Higgins v. Bullock*, 66 Ill. 37; *Primrose v. Browning*, 59 Ga. 69; *Golden Paper Co. v. Clark*, 3 Colo. 321; *National Ins. Co. v. Chamber of Commerce*, 69 Ill. 22; *Kirkwood v. Reedy*, 10 Kan. 453; *Toledo, P. & W. R. Co. v. Butler*, 53 Ill. 323; *McClure v. Wells*, 46 Mo. 194; *Northrup v. Shephard*, 23 Wis. 513; *Corby v. Burns*, 36 Mo. 194; *Nelson v. Cook*, 19 Ill. 440; *Barker v. Binninger*, 14 N. Y. 270.

The officer may show facts outside the return not inconsistent therewith. *Evans v. Davis*, 3 B. Mon. 344. The return is not conclusive evidence in favor of the officer, but it is admissible in



his favor. *Glover v. Whittenhall*, 2 Denio, 633; *Dasher v. Dasher*, 47 Ga. 320; *Bond v. Wilson*, 8 Kan. 229.

An officer cannot be compelled to amend a return. *Humphries v. Lawson*, 7 Ark. 341; *Vastine v. Fury*, 2 Serg. & R. 426; *Sawyer v. Curtis*, 2 Ashm. 127.

If the return is false, the officer is answerable for it; but its truth or falsity cannot be inquired into in an action between other parties. A stranger is not permitted to inquire into any defects in the return. The return being a matter of record, other courts in collateral actions, will not inquire into the matters set forth therein. *Learned v. Vanderburgh*, 7 How. Pr. 379; *Gunn v. Howell*, 35 Ala. 144; *Terrill v. Auchauer*, 14 Ohio St. 80; *Muel-ler v. Bates*, 2 Disney, 318; *Stoors v. Kelsey*, 2 Paige, 418, 2 L. ed. 970; *Davis v. Campbell*, 12 Ind. 192; *Perrin v. Leverett*, 13 Mass. 128; *Phillips v. Coffee*, 17 Ill. 154; *Moore v. Titman*, 33 Ill. 359.

Two States have held return of officers only prima facie evidence of facts therein stated. *Waddell v. Judson*, 12 La. Ann. 13; *Grant v. Harris*, 16 La. Ann. 323; *Butts v. Francis*, 4 Conn. 424; *Watson v. Watson*, 6 Conn. 334; *Sanford v. Nichols*, 14 Conn. 324; *Palmer v. Thayer*, 28 Conn. 237.

### § 145. Evidence in its Relation to Deeds.

a. **Possession and Record Prima Facie Evidence of Delivery and Acceptance.**—The possession and record of a deed are prima facie evidence of delivery and acceptance (*Brown v. State*, 5 Colo. 496); but where the evidence discloses the delivery of the deed in violation of an escrow agreement, such deed can have no force nor validity. *Hamill v. Thompson*, 3 Colo. 518. No form of words is necessary in the delivery of the deed. If the evidence shows that the grantor has parted with his dominion over it, with the intent that it shall pass title to the grantee, provided the grantee assents to it, either by himself or his agent, such transfer operates to pass a valid title. *Warren v. Swett*, 31 N. H. 332. An admirable discussion of this topic will be found in the case of *Martz v. Eggemann*, 44 Mich. 430. Consult also *Jones v. Loveless*, 99 Ind. 327; *Miller v. Lullman*, 81 Mo. 311.

Parol evidence that a grantee in a deed was not to enter until purchase money was paid, the deed being silent, is inadmissible. *Omaha & G. S. & R. Co. v. Tabor*, 13 Colo. 41.

It is competent to make certain the subject matter of an excep-

tion in a deed made in general terms by evidence *aliunde*. *Pipe v. Smith*, 4 Colo. 444, 5 Colo. 156; *Laughlin v. Hawley*, 9 Colo. 174; *Hanna v. Barker*, 6 Colo. 311; *Breeze v. Haley*, 10 Colo. 7.

General terms of description in a conveyance may be explained by parol evidence. *Pipe v. Smith*, 4 Colo. 444.

Many questions involving title to real estate turn upon the intent of the party and evidence of the circumstances surrounding the transaction in making the delivery of the deed. *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Stewart v. Redditt*, 3 Md. 67; *Burkholder v. Casad*, 47 Ind. 418; *Harris v. Harris*, 59 Cal. 620; *Jordan v. Davis*, 108 Ill. 336; *Thompson v. Hammond*, 1 Edw. Ch. 497, 6 L. ed. 223.

**b. Acknowledgment and Record Entitle Deed to Admission in Evidence.**—The rule of evidence is of wide application that a deed duly acknowledged and recorded is admissible in evidence without further proof of execution. *Clark v. Troy*, 20 Cal. 220; *Samuels v. Borrowscale*, 104 Mass. 207; *Simpson v. Munde*, 3 Kan. 181; *Reed v. Kemp*, 16 Ill. 445; *Keichline v. Keichline*, 54 Pa. 75; 3 Washb. Real Prop. (4th ed.) 322; *Martindale*, Conveyancing, 212.

**c. Presumption as to Acknowledgment.**—The law presumes that the acknowledgment was made at the place and at the time stated in the certificate. *Granniss v. Irvine*, 39 Ga. 22. Such a deed duly acknowledged is competent evidence of the matters therein contained, without proof of the handwriting of the magistrate or officer taking the acknowledgment. *Goddard v. Gloninger*, 5 Watts, 219. A California case holds that a deed should not be refused admission in evidence, but should be received in case of defective acknowledgment, with instructions to the jury as to its effect. *Hastings v. Vaughn*, 5 Cal. 315. As previously stated, a deed absolute on its face may be shown to be a mortgage; but if the instrument shows upon its face that it is a mortgage, parol evidence is not received to show that the parties intended to make a conditional sale. The construction of the instrument must not depend upon oral evidence. *Alstin v. Cundiff*, 52 Tex. 453.

**d. Strict Proof Required in Doubtful Cases.**—Where a deed absolute in its recitals, and perfect in all requirements, is given the effect of a mortgage or security only, the proof of such an intent must be direct and conclusive. *Taintor v. Keys*, 43

Ill. 332; *Sharp v. Smitherman*, 85 Ill. 153; *Edwards v. Wall*, 79 Va. 321; *Knowles v. Knowles*, 86 Ill. 1; *Smith v. Cremer*, 71 Ill. 185; *Knight v. McCord*, 63 Iowa, 429; *Price v. Karnes*, 59 Ill. 276; *Williams v. Stratton*, 10 Smedes & M. 418; *Coburn v. Anderson*, 62 How. Pr. 268; *Jones v. Brittan*, 1 Woods, 667; *Bingham v. Thompson*, 4 Nev. 224; *Hopper v. Jones*, 29 Cal. 18; *Conwell v. Evill*, 4 Blackf. 67; *Pierce v. Traver*, 13 Nev. 526; *Johnson v. Van Velsor*, 43 Mich. 208; *Williams v. Cheatham*, 19 Ark. 278; *Butler v. Butler*, 46 Wis. 430; *Henley v. Hotaling*, 41 Cal. 22; *Moore v. Ivey*, 8 Ired. Eq. 192; *Tilden v. Streeter*, 45 Mich. 533; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027.

A deed absolute on its face, but intended as and proved to be a mortgage, is not fraudulent as to creditors. *Ross v. Duggan*, 5 Colo. 85.

**e. What may be Shown by Parol Evidence.**—It may be shown by parol evidence that a deed in the possession of the grantee was not delivered. The principle that parol evidence is not admissible to contradict a deed has no application to a case of this kind. *Adams v. Frye*, 3 Met. 103; *Black v. Shreve*, 13 N. J. Eq. 457; *Wolverton v. Collins*, 34 Iowa, 238; *Johnson v. Baker*, 4 Barn. & Ald. 440; *Den v. Farlee*, 12 N. J. L. 374; *Little v. Gibson*, 39 N. H. 505; *Williams v. Sullivan*, 10 Rich. Eq. 217; *Morris v. Henderson*, 37 Miss. 501. See also *Goodlett v. Kelly*, 74 Ala. 213. In *Roberts v. Jackson*, 1 Wend. 478, 485, it is said: "The second ground of defense rests on the deed from Webb. In relation to this point, the jury have found that the deed from Webb to the defendant was never delivered; and this verdict is fully warranted by the evidence. The only question here is, whether parol evidence could be received to show the nondelivery. It is always competent to show that the deed was delivered as an escrow, or that the grantee obtained possession of it by fraud or in an unwarrantable manner. This must, of necessity, be shown by parol, and this species of evidence has never been considered as coming within the rule which rejects parol proof when offered to contradict a deed."

There is a distinction to be drawn between a case where evidence is offered for the purpose of showing that a deed was not delivered until the performance of some condition precedent, and a case where it was actually delivered, with an agreement that a condition was to be performed. In the former case, the object

of introducing such testimony is to show that the instrument was never legally delivered, and that, consequently, it never possessed any validity. In the latter, the effect of the evidence would be to contradict a written instrument, which is absolute upon its face, by showing, in opposition to its terms, that it was conditional and not absolute. *Black v. Lamb*, 12 N. J. Eq. 116. And see *Ford v. James*, 2 Abb. App. Dec. 162; *Devlin, Deeds*, § 295.

### § 146. Pleadings in Their Relation to Evidence.

#### a. Answer of One Defendant as Evidence against Others.—

The answer of one defendant is not evidence against his co-defendant. The cases are uniform in regard to this general rule. *Harrison v. Edwards*, 3 Litt. 340; *Clark v. VanRiemsdyk*, 13 U. S. 9 Cranch, 153, 3 L. ed. 688; *Dade v. Madison*, 5 Leigh, 401; *Gresley, Eq. Ev.* 24, 25; *Daniel v. Ballard*, 2 Dana, 296; *Field v. Holland*, 10 U. S. 6 Cranch, 8, 3 L. ed. 136; *Moseley v. Armstrong*, 3 T. B. Mon. 287, 289; *Harrison v. Johnson*, 3 Litt. 286; *Hayward v. Carroll*, 4 Harr. & J. 518; *Fanning v. Pritchett*, 6 T. B. Mon. 79, 80; *Blight v. Banks*, 6 T. B. Mon. 192, 197; *Hoomes v. Smock*, 1 Wash. (Va.) 389, 392; *Timberlake v. Cobbs*, 2 J. J. Marsh. 136; *Rundlet v. Jordan*, 3 Me. 47; *Webb v. Pell*, 3 Paige, 368, 370, 3 L. ed. 191, 192; *DeForest v. Parsons*, 2 Hall, 130; *Winters v. January*, Litt. Sel. Cas. 13; *Turner v. Holman*, 5 T. B. Mon. 411; *Thomasson v. Tucker*, 2 Blackf. 172; *Phœnix v. Dey*, 5 Johns. 412, 426; *Jones v. Bullock*, 3 Bibb. 467; *Hardin v. Baird*, Litt. Sel. Cas. 341; *Jones v. Tuberville*, 2 Ves. Jr. 11; *Morse v. Royal*, 12 Ves. Jr. 355, 360; *VanRiemsdyk v. Kane*, 1 Gall. 630; *Parker v. Morrell*, 12 Jur. 253; *Mills v. Gore*, 20 Pick. 28; *Wych v. Meal*, 3 P. Wms. 311; 1 Starkie, *Ev.* 284, 285; *Grant v. Bissett*, 1 Cal. Cas. 112; *Dexter v. Arnold*, 3 Sumn. 152; *Lenox v. Notrebe*, Hempst. 251; *Hoare v. Johnstone*, 2 Keen, 553, 1 Barb. Ch. Pr. 496.

Where there are several co-defendants, who have a common interest, the declaration of one of them is evidence against the others. *Griffin v. Pleasant*, 1 Ired. Eq. 152.

The admissions of a grantee in his answer, that his grantor, the complainant, had conveyed his property to defraud creditors, is not evidence against the grantor. *Hardin v. Baird*, Litt. Sel. Cas. 341. Where defendant referred to another as his agent and as having a more perfect knowledge than himself of the matters, the agent was made a party and his answer was allowed to be read

against his principal. *Anon.* 1 P. Wms. 300. One defendant may adopt the other's answer, and so make it evidence against the former. *Mosley v. Armstrong*, 3 T. B. Mon. 289; *Nantz v. McPherson*, 7 T. B. Mon. 597, 600.

The answer of the obligee is no evidence against his previous assignee, a party in same suit (*Fanning v. Pritchett*, 6 T. B. Mon. 79, 80; *Turner v. Holman*, 5 T. B. Mon. 411); nor the answer of the wife against the husband (*City Bank v. Bangs*, 3 Paige, 36, 3 L. ed. 47); nor the answer of the debtor admitting his insolvency against a co-defendant, his surety. *Daniel v. Ballard*, 2 Dana, 296. The mere silence of one defendant is, of course, no evidence against his co-defendant. *Timberlake v. Cobbs*, 2 J. J. Marsh. 136; *Blight v. Banks*, 6 T. B. Mon. 192; *Harrison v. Johnson*, 3 Litt. 286.

The general rule above stated does not apply where all the defendants are partners in the same transactions; for in respect to these, the answer of either is evidence against the others. Nor does it apply to cases where the other defendant claims through him whose answer is offered in evidence, as privy in estate. *Clark v. Van Riemsdyk*, 13 U. S. 9 Cranch, 153, 157, 3 L. ed. 688, 689; *Chapin v. Coleman*, 11 Pick. 331; *Williams v. Hodgson*, 2 Harr. & J. 474, 477; *Osborn v. United States Bank*, 22 U. S. 9 Wheat. 738, 832, 6 L. ed. 204, 226; *Christie v. Bishop*, 1 Barb. Ch. 105, 116, 5 L. ed. 316, 321; *Field v. Holland*, 10 U. S. 6 Cranch, 8, 3 L. ed. 136.

But upon a bill by one against his co-partners for an account, the answer of one of the partners will not be evidence against another, unless it appears that the defendants as constituting a partnership *inter se* of the one part were in partnership with the plaintiff of the other part. *Chapin v. Coleman*, 11 Pick. 331.

The answer of one defendant to a bill in chancery is not evidence for a co-defendant. *Lenox v. Notrebe*, Hempst. 251.

Admissions of an agent, made without authority, are not evidence against the principal. *Robinson v. Morgan*, Litt. Sel. Cas. 56.

The declarations of an agent should form part of the *res gestæ* in order to be competent evidence against either party. *M'Clure v. Purcel*, 3 A. K. Marsh. 63. If they are part of the *res gestæ*, or took place while the agent was making the agreement, or otherwise proceeding within the scope and bounds of his authority, they are the declarations of the principal himself, and admissible

in evidence. *Rawson v. Adams*, 17 Johns. 130; *Sherman v. Crosby*, 11 Johns. 70; *Shelhamer v. Thomas*, 7 Serg. & R. 109; *Hood v. Reeve*, 3 Car. & P. 532; *Coleman v. Southwick*, 9 Johns. 45, 55; *Benjamin v. Smith*, 4 Wend. 334; *Thalhimer v. Brinkerhoff*, 4 Wend. 396; *Burlington v. Calais*, 1 Vt. 385; *Perkins v. Burnett*, 2 Root, 30; *Mather v. Phelps*, 2 Root. 150; *Irving v. Motly*, 7 Bing. 543; *Webb v. Alexander*, 7 Wend. 281; *Bank of United States v. Davis*, 2 Hill, 451, 461, 464; Story, Agency, §§ 134, 135.

**b. Admissions in Pleadings Competent as Evidence.**—As we have seen, “when a party to civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence, and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are conclusive in that action. They may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit. They are received in evidence, because of the great probability that a party would not admit or state anything against himself or his own interest unless it were true. And I am unable to see why the rule does not apply to admissions contained in the pleadings in an action under our system of practice, which requires the facts to be alleged truly in the pleadings. It must first be shown, however, by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction.” *Cook v. Barr*, 44 N. Y. 156.

**c. What is Confessed or Admitted need not be Proved; Extended Review of the Authorities.**—Where an answer is put in issue, what is confessed and admitted need not be proved. *Ringgold v. Ringgold*, 1 Harr. & G. 11, 18 Am. Dec. 266; *Clements v. Moore*, 73 U. S. 6 Wall. 315, 18 L. ed. 789. The defendant must make out by proof what is insisted on by him by way of avoidance. *Ringgold v. Ringgold*, *supra*. Otherwise the admission stands as if the fact in avoidance had not been averred. *Robinson v. Catheart*, 3 Cranch, C. C. 379, 2 Cranch, C. C. 600. See *Ringgold v. Ringgold*, 1 Harr. & G. 11; *Skin-*

*ner v. White*, 17 Johns. 367; *Beckwith v. Butler*, 1 Wash. (Va.) 286; *Hoomes v. Smock*, 1 Wash. (Va.) 389; *Chapman v. Turner*, 1 Call, 280; *Maupin v. Whiting*, 1 Call, 224; *Bullock v. Goodall*, 3 Call, 44; *Auditor v. Johnson*, 1 Hen. & M. 542; *Dangerfield v. Caliborne*, 2 Hen. & M. 17; *Page v. Winston*, 2 Munf. 298; *Scott v. Gibbon*, 5 Munf. 86; *Thompson v. Strode*, 2 Hen. & M. 19; *Leeds v. Marine Ins. Co.* 15 U. S. 2 Wheat. 383, 4 L. ed. 267. In setting up matter not in the bill a new case is presented, and if founded on a right or title operating, if made out, to bar and avoid plaintiff's equity, which must otherwise prevail, such answer is no evidence which plaintiff is bound to contradict or rebut. *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 287. See *Paynes v. Coles*, 1 Munf. 397; *Clason v. Morris*, 10 Johns. 548; *Leeds v. Marine Ins. Co. supra*; *Lenox v. Prout*, 16 U. S. 3 Wheat. 527, 4 L. ed. 451. It must be established affirmatively by the defendant, independently of his oath. *Byers v. Fowler*, 12 Ark. 218, 54 Am. Dec. 287; *Howe v. Williams*, 2 Cliff. 261. See also *Fant v. Miller*, 17 Gratt. 209; *James v. McKernon*, 6 Johns. 559; *Green v. Hart*, 1 Johns. 590; *Skinner v. White*, 17 Johns. 367; *Anderson v. Roberts*, 18 Johns. 534; 2 Story, Eq. Jur. 1529. A discharge set up in avoidance, coupled with an admitted liability, if the answer be replied to, must be proved by the defendant. *McCoy v. Rhodes*, 52 U. S. 11 How. 141, 13 L. ed. 638; *Ringgold v. Ringgold, supra*. See *Napier v. Elam*, 6 Yerg. 112. As to the effect to be given to matters set up in the answer by way of avoidance, there has been some conflict of authority. In New York, South Carolina and New Jersey the doctrine is well settled that matters of avoidance set out in the answer, responsive to the allegations in the bill, are to be considered as equivalent to an affidavit on a motion for an injunction. In Maryland and Georgia a contrary doctrine obtains. In Maryland (*Salmon v. Clagett*, 3 Bland, Ch. 162), while enforcing its views of the rule, the court says that the rule was not mentioned in any English digest, compilation or book, other than Barnardiston's Reports. The court in Georgia (*Moore v. Ferrell*, 1 Kelly, 7), relied solely for its construction on the principal case; but the decision in this case has been repeatedly reversed in New York. *United States v. Parrott*, McAll. 285. If an answer is responsive, it is evidence of the fact it alleges, requiring testimony to rebut it; but if not responsive, it is not evidence of such matter, but must be proved. *Com. v. Cullen*, 13 Pa. 143, 53 Am. Dec. 458; *Fluharty*

v. *Beatty*, 4 W. Va. 525; *Boone v. Chiles*, 35 U. S. 10 Pet. 211, 9 L. ed. 400; *Wilkinson v. Bauerle*, 5 Cent. Rep. 124, 41 N. J. Eq. 635; *Wakeman v. Grover*, 4 Paige, 23, 3 L. ed. 325; *Simpson v. Hart*, 14 Johns. 63; *Lovett v. Demarest*, 5 N. J. Eq. 113; *Mott v. Harrington*, 12 Vt. 199; *Neal v. Patten*, 40 Ga. 374. See *Clark v. Van Riemsdyk*, 13 U. S. 9 Cranch, 153, 3 L. ed. 689. All matters fairly responsive are evidence (*Forrest v. Forrest*, 6 Duer, 102), although several of the averments may not be precisely responsive. *Mason v. Crosby*, 3 Woodb. & M. 270. Where in some part responsive, the answer would have the weight to which it is entitled. *Allen v. Woonsocket Co.* 13 R. I. 146. Chancery pleadings are admissible in evidence upon the theory that they truly state the facts. *Boots v. Canine*, 94 Ind. 413. Where an answer is responsive to the bill, and denies a fact, unequivocally and under oath, the fact denied must in most cases be proved, not only by the testimony of one witness, but by some additional evidence, to turn the scale in favor of the plaintiff. *Carpenter v. Providence Wash. Ins. Co.* 45 U. S. 4 How. 217, 11 L. ed. 945. See *Daniel v. Mitchell*, 1 Story, 188; *Higbie v. Hopkins*, 1 Wash. C. C. 230; *Union Bank v. Geary*, 30 U. S. 5 Pet. 99, 8 L. ed. 60. The additional evidence must be a second witness, or very strong circumstances. *Carpenter v. Providence Wash. Ins. Co. supra*. See *Hughes v. Blake*, 1 Mason, 514; *Clark v. Van Riemsdyk*, 13 U. S. 9 Cranch, 153, 3 L. ed. 688.

When a party is examined before a master in relation to his rights in the cause, the examination is in the nature of a bill of discovery. There can be no cross-examination by his own counsel, and he cannot give testimony in his favor, except so far as his answers may be responsive to the questions put by the opposite party. *Foote v. Silsby*, 3 Blatchf. 509. See *Remsen v. Remsen*, 2 Johns. Ch. 495, 1 L. ed. 463; *Benson v. Le Roy*, 1 Paige, 122, 2 L. ed. 585; 1 Barb. Ch. Pr. 492.

Subject to certain exceptions, defendant has the right to use his own evidence given in answer to a bill of discovery. *Barry v. Galvin*, 37 How. Pr. 311. By the former practice the right of the party to discharge himself, when he was charged by the admission in his own answer, was very much restricted. If the circumstances of the charge and discharge were so immediately connected as to form, in fact, only parts of the very same transaction, the charge and avoidance were taken together. *Richard-*



*son v. Wilkins*, 19 Barb. 513. See *Woodcock v. Bennet*, 1 Cow. 743; *Clayson v. Morris*, 10 Johns. 542; *Jackson v. Hart*, 11 Wend. 343; *Forsyth v. Clark*, 3 Wend. 643; *Stafford v. Bryan*, 1 Paige, 239, 2 L. ed. 631.

### § 147. Receipts; their Effect and Conclusiveness.

**a. Mere Acknowledgment of Payment not Treated as Conclusive.**—The mere acknowledgment of payment is not treated in law as binding or conclusive in any high degree. So far as a simple acknowledgment of payment or delivery is concerned, it is presumptive evidence only. *Thompson v. Faussat*, 1 Pet. C. C. 181; *Dobbin v. Perry*, 1 Rich. L. 32; *Goslin v. Cannon*, 1 Harr. (Del.) 5; *Cannon v. Kinney*, 3 Harr. (Del.) 317; *Nicholson v. Frazier*, 4 Harr. (Del.) 206; *Southwick v. Hayden*, 7 Cow. 334; *McCrea v. Purmort*, 16 Wend. 460; *Rollins v. Dyer*, 16 Me. 475; *Humphries v. McGraw*, 5 Ark. 61; *Johnson v. Johnson*, 11 Mass. 363; *Weed v. Snow*, 3 McLean, 265; *Blight v. Banks*, 6 T. B. Mon. 199; *Murray v. Gouverneur*, 2 Johns. Cas. 438; *Skaiife v. Jackson*, 3 Barn. & C. 421; *Robinett v. Wilson*, 8 Gill. 179; *Hill v. Robison*, 3 Jones, L. 501.

**b. Generally Open to Explanation.**—It is, in general, open to explanation, and is an exception to the rule that parol evidence is inadmissible to contradict or vary a written instrument. *House v. Low*, 2 Johns. 378; *Johnson v. Weed*, 9 Johns. 310; *Pettus v. Roberts*, 6 Ala. 811; *Hogan v. Reynolds*, 8 Ala. N. S. 59; *Giddings v. Munson*, 4 Vt. 308; *McDaniels v. Lapham*, 21 Vt. 222; *Weed v. Snow*, 3 McLean, 265; *Lawrence v. Schuykill Nav. Co.* 4 Wash. C. C. 562; *Thomas v. Austin*, 4 Barb. 265; *Baugh v. Brassfield*, 5 J. J. Marsh. 79; *Morris v. Morris*, 5 Mich. 171; *Bebee v. Moore*, 3 McLean, 387; *Tobey v. Barber*, 5 Johns. 68; *Brooks v. White*, 2 Met. 283; *Lingan v. Henderson*, 1 Bland, Ch. 249; *Harden v. Gorden*, 2 Mason, 541; *Rollins v. Dyer*, 16 Me. 475; *Ensign v. Webster*, 1 Johns. Cas. 145; *Keller v. Lieb*, 1 Penr. & W. 220; *Dutton v. Tilden*, 13 Pa. 46; *Walrath v. Norton*, 10 Ill. 437; *Driver v. Hudspeth*, 16 Ala. 348; *Cole v. Taylor*, 22 N. J. L. 59.

The circumstances under which it was given, a fraud, a mistake, or that no money was, in fact, paid, or that it was rescinded by agreement of the parties, may be shown. *Putnam v. Lewis*, 8 Johns. 389; *Emrie v. Gilbert*, Wright, 764; *Trisler v. Williamson*, 4 Harr. & McH. 219; *Egleston v. Knickerbocker*, 6 Barb. 458;

*Whittemore v. Stout*, 3 Dana, 427; *Union Bank v. Sollee*, 2 Strobh. L. 390; *Davis v. Allen*, 3 N. Y. 168; *Beach v. Packard*, 10 Vt. 96. But see *Hillyer v. Vaughan*, 1 J. J. Marsh. 583; *Van Nest v. Talmage*, 17 Abb. Pr. 99.

When a receipt is "in full," "in full of all accounts," or of "all demands," it is evidence of a compromise and mutual settlement of the rights of the parties. The law infers from such acknowledgment, an adjustment of the amount due, after consideration of the claims of each party, and a payment of the specified sum, as a final satisfaction. *Sutton v. Tyrrell*, 10 Vt. 491; *Reid v. Reid*, 2 Dev. L. 247; *Whiting v. Bradley*, 2 N. H. 85.

**c. Exception as to Receipt "in Full."**—In general, a receipt in full is conclusive when given with a knowledge of the circumstances, and when the party giving it cannot complain of any misapprehension as to the compromise he was making, or of any fraud. *Holbrook v. Blodgett*, 5 Vt. 520; *Bristow v. Eastman*, 1 Esp. 173; *Alner v. George*, 1 Campb. 392; *Eve v. Mosely*, 2 Strobh. L. 203. It is a waiver of interest, and prohibits the enforcement of any further demand. *Cutler v. New York*, 92 N. Y. 166.

**d. The Authorities Reviewed.**—Receipts of this character are not wholly exempt from explanation. Fraud or misrepresentation may be proved, and so may any such mistake as enters into and vitiates the compromise of the demand admitted (*Reynolds v. Scott*, Brayton, (Vt.) 75; *Houston v. Shindler*, 11 Barb. 36; *Joslyn v. Capron*, 64 Barb. 598; *Snyder v. Findley*, 1 N. J. L. 48; *Hogg v. Brown*, 2 Brev. 223; *Trisler v. Williamson*, 4 Harr. & McH. 219; *Thomas v. Austin*, 4 Barb. 265; *Derrickson v. Morris*, 2 Harr. (Del.) 392; *Riley v. White*, 6 N. Y. Leg. Obs. 272; *Dibdin v. Morris*, 2 Car. & P. 44; *McDougall v. Cooper*, 31 N. Y. 498); or when, there being no dispute as to the amount due, less than the full amount is paid, the receipt, though in full, may be explained or contradicted. *Foersch v. Blackwell*, 14 Barb. 607; *Thomas v. M'Daniel*, 14 Johns. 185; *Rourke v. Storey*, 4 E. D. Smith, 54. A receipt which embodies a contract is not open to explanation or contradiction by parol evidence, like a simple receipt. *Langdon v. Langdon*, 4 Gray, 186; *McPheeters v. Campbell*, 5 Ind. 109; *Killogg v. Richards*, 14 Wend. 116; *Fay v. Valentine*, 12 Pick. 40; *Tinney v. Ashley*, 15 Pick. 347; *Coon v. Knapp*, 8 N. Y. 402.

A receipt for rent is presumptive evidence that all rent accruing previous to that receipted for had been paid. *Decker v. Livingston*, 15 Johns. 479.

Parol evidence is admissible to show for what purpose a receipt was given, to what fund it referred, and to inquire into the consideration. *Colburn v. Lansing*, 46 Barb. 37.

Receipts upon the faith of which others have acted cannot be gainsaid. *Union Bank v. Sollee*, 2 Strobb. L. 390, 407.

A receipt in payment for a bill of goods, unexplained or uncontradicted, is conclusive against a recovery for the goods. *Lambert v. Seely*, 17 How. Pr. 432.

A party is not precluded, by a receipt in full of all demands up to a certain date, from showing that there were demands existing at the date of such receipt, which were unsettled and unpaid, although not then due. *Churchill v. Bradley*, 11 Jones & S. 170.

A receipt embodied in a promissory note, given upon a settlement between the parties, is open to explanation by parol as to what was settled, the same as if it were in a separate instrument. *Smith v. Holland*, 61 N. Y. 635.

A receipt unexplained is conclusive. *Moore v. The Fashion*, Newb. 49; *Moore v. Newbury*, 6 McLean, 472. In Connecticut, a receipt in full is, in the absence of fraud, mistake, accident or surprise, a good defense in bar. It will operate like a discharge to defeat any further claim by the party giving it. *Beam v. Barnum*, 21 Conn. 200; *Fuller v. Crittenden*, 9 Conn. 401; *Tucker v. Baldwin*, 13 Conn. 137; *Hurd v. Blackman*, 19 Conn. 177.

A receipt given by an authorized agent is conclusive upon his principal for the amount actually received, but no further. *Dyer v. Girard*, 2 Root, 55. See *Pate v. United States*, 4 Ct. Cl. 523. See also, as to effect of receipts in particular cases, *United States v. Gear*, 3 McLean, 571; *Michoud v. Girod*, 45 U. S. 4 How. 503, 11 L. ed. 1076; *Butler v. The Arrow*, 6 McLean, 470; *Jackson v. Hale*, 55 U. S. 14 How. 525, 14 L. ed. 526; *The Mary Paulina*, 1 Sprague, 45; *Leak v. Isaacson*, Abb. Adm. 41; *Jackson v. White*, 1 Pet. Adm. 179; *Whiteman v. The Neptune*, 1 Pet. Adm. 180; *The Rajah*, 1 Sprague, 199; *Bates v. Seabury*, 1 Sprague, 433; *Payne v. Allen*, 1 Sprague, 304; *Whitney v. Eager*, Crabbe, 422; *Piehl v. Balchen*, Olcott, 24.

### § 148. Newspapers in Evidence.

a. **A Price Current List.**—A price current list, published in a

newspaper, is not competent evidence of market value without proof as to the sources from which the information therein was obtained; or whether the quotations of prices were from actual sales or otherwise. The credit to be given the paper must depend upon some such extrinsic proof; it cannot be determined by the publication itself. *Whelan v. Lynch*, 60 N. Y. 469.

**b. Notice of Dissolution.**—Notice of dissolution or retirement published in some newspaper of general circulation is sufficient, except as to such persons as have actually had dealings with the firm. *Graves v. Merry*, 6 Cow. 701; *Polk v. Oliver*, 56 Miss. 566; *Prentiss v. Sinclair*, 5 Vt. 149; *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482.

Persons having no knowledge of the partnership are not entitled to notice of its dissolution, or of the retirement of a partner. *Nussbaumer v. Becker*, 87 Ill. 281; *Chamberlain v. Dow*, 10 Mich. 319; *Oregler v. Durham*, 9 Ind. 375.

Publication of notice in a newspaper taken by the person sought to be charged with notice is a fact from which a jury may infer actual notice. *Page v. Brant*, 18 Ill. 37. .

In *Vernon v. Manhattan Co.* 22 Wend. 183, it appeared on the trial that the paper in which the notice of the dissolution was published was taken at the bank; and the counsel for the defendants called upon the court to charge the jury that this was in law proof of notice of the dissolution. But the judge told the jury that it was not in law actual notice of the fact. On appeal *Chancellor Walworth*, writing the opinion, said: "I have no doubt, upon the cases that have been decided, that upon such evidence, if there are no circumstances from which a different conclusion may be drawn, the jury may be authorized to presume that the party by whom the paper was taken had read the notice of dissolution, and was therefore actually aware that it had taken place at the time the new security was taken in the name of the firm. That, however, would not have justified the court in charging the jury as a matter of law, that the taking of a newspaper filled with advertisements was actual notice of everything contained therein. Where a special notice is necessary, in consequence of a previous dealing with the firm, or a credit already raised upon the faith of the copartnership, such notice may be inferred from many circumstances, as well as from direct and positive proof of notice of the dissolution; but to exempt the copartners from lia-

bility, the jury must be satisfied that the person with whom the new debt was contracted either had actual notice that the copartnership was dissolved, or that facts had actually come to his knowledge sufficient to create a belief that such was the fact."

§ 149. **Exemplifications of Patents, Grants, Records, Surveys, Plats, Maps, etc.**

**a. Patent under Seal of the United States Conclusive.**—A patent under the seal of the United States is conclusive proof of the act of granting by its authority; and its exemplification is a record of absolute verity. *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 728, 8 L. ed. 547, 561.

**b. Exemplifications of Public Grants Admissible in Evidence.**—Exemplifications of public grants of land by the State are evidence. And in New York it is no objection to an exemplification of the patent granted in 1787, that the name of the governor of the State *pro tem* does not appear subscribed to it, or that the letters "L. S." designating the place of the great seal, do not appear upon it, it being judicially known that, at that period, and long after, the seal was appended to patents, instead of being impressed upon them; and the legal presumption being that no patent would be issued or recorded unless executed in due form of law. *Williams v. Sheldon*, 10 Wend. 654. See *Hedden v. Overton*, 4 Bibb. 406.

The great seal authenticates the patent, and it seems, is *per se* to be regarded as prima facie evidence that the patent has been approved by the commissioners of the land office, and was issued by their direction. *Williams v. Sheldon*, 10 Wend. 654; *Jackson v. Sheldon*, 5 Cow. 460.

Surveys, maps, plats and other papers, filed or on record in the land office, are frequently resorted to in tracing title. The following authorities will exhibit much of the doctrine on the subject, particularly as it prevails in Pennsylvania, where questions respecting the admissibility and competency of surveys, etc., have often arisen. *Fothergill v. Stover*, 1 U. S. 1 Dall. 7, 1 L. ed. 13; *Shield v. Buchannan*, 2 Yeates, 219; *Hewes v. M'Dowell*, 1 U. S. 1 Dall. 5, 1 L. ed. 12; *Masters v. Shute*, 2 U. S. 2 Dall. 81, 1 L. ed. 298; *Biddle v. Shippen*, 1 U. S. 1 Dall. 19, 1 L. ed. 19; *Hurst v. Dippo*, 1 U. S. 1 Dall. 20, 1 L. ed. 19; *Penn v. Ingham*, 3 Wash. C. C. 90; *Salmon v. Rance*, 3 Serg. & R. 315; *Griffith v. Evans*, 1 Pet. C. C. 166; *M'Clemens v. Graham*, 2

Serg. & R. 460; *Griffith v. Tunckhouser*, 1 Pet. C. C. 418; *Todd v. Ockerman*, 1 Yeates, 295; *Jones v. Bache*, 3 Wash. C. C. 199; *Morris v. Vanderen*, 1 U. S. 1 Dall. 64, 1 L. ed. 38; *Penn v. Hartman*, 2 U. S. 2 Dall. 230, 1 L. ed. 360; *Burd v. Seabold*, 6 Serg. & R. 137; *Motz v. Bolard*, 6 Serg. & R. 210; *Eddy v. Faulkner*, 3 Yeates, 580, 1 Binn. 188; *Torrey v. Beardsly*, 4 Wash. C. C. 242; *M'Kelry v. Gilleland*, 3 Watts, 312; *Burchfield v. McCauley*, 3 Watts, 9; *Snyder v. Bowman*, 4 Watts, 132; *Zerbe v. Schall*, 4 Watts, 138; *M'Cormick v. M'Murtrie*, 4 Watts, 193; *Murtz v. Hartley*, 4 Watts, 261; *Bellas v. Levan*, 4 Watts, 294; *M'Call v. Sybert*, 4 Watts, 431; *Beeson v. Hutchinson*, 4 Watts, 442; *Keene v. Lownsbury*, 5 Watts, 348; *Freytag Powell*, 1 Whart. 536; *Gardinier v. Marcy*, 5 Watts, 337; *Ross v. Barker*, 5 Watts, 391; *Steinmetz v. Logan*, 5 Watts, 518; *Smith v. Collins*, 5 Watts, 505; *Lindsay v. Scroggs*, 2 Rawle, 141; *Wilson v. Stoner*, 9 Serg. & R. 39; *Galt v. Galloway*, 29 U. S. 4 Pet. 332, 7 L. ed. 876.

### § 150. Evidence of Private Statutes and Their Preambles.

—Beyond question, the recitals of a public statute are admissible between private individuals only as *prima facie* and not as conclusive evidence of the facts therein stated, and of the recitals of a private statute, it may be averred that in general, while they evidence certain facts to have been represented to the Legislature, they are not proof that such facts actually existed. *McKinnon v. Bliss*, 21 N. Y. 206.

That the preambles to public statutes are admissible in suits between private individuals, as evidence of the facts recited in them, may perhaps be conceded (*Rex v. Sutton*, 4 Maule & S. 532); although in such cases the evidence, I apprehend, is *prima facie* only, and not conclusive. But private statutes have never been held admissible against parties in no way connected with such statutes. Evidence of this description was rejected by the court of king's bench in the case of *Brett v. Beales*, Mood. & M. 416, although the Act in that case expressly provided that it "should be deemed and taken to be a public act," and should be "judicially taken notice of as such by all judges, justices and others, without being specially pleaded."

The objections to such evidence are well stated in the case of *Elmondorff v. Carmichael*, 3 Litt. 473. The court there says: "The facts recited in the preamble of a private statute may be

evidence between the Commonwealth and the applicant or party for whose benefit the act was passed. But as between the applicant and another individual whose rights are effected, the facts recited ought not to be evidence. Once adopt the principle that such facts are conclusive, or even *prima facie* evidence against private rights, and many individual controversies may be prejudiced and drawn from the functions of the judiciary into the vortex of legislative usurpation. Such preamble is evidence that the facts were so represented to the Legislature, and not that they really existed." See also *McKinnon v. Bliss*, *supra*.

§ 151. **Voluminous Documents.**—If the original documents are inconveniently voluminous or numerous, and the result to be gathered from them is the material fact, a qualified witness who has examined them may testify to the result, subject to cross-examination on details; and an abstract or summary, made by him out of court with the originals before him, and which he testifies is correct, may be received in evidence instead of requiring the originals. *Burton v. Driggs*, 87 U. S. 20 Wall. 125, 22 L. ed. 299; *Ulster County National Bank v. Madden*, 41 Hun, 113, where Landon, J., says: "A true copy differs from a true abstract only in degree." *Hollingsworth v. State*, 9 West. Rep. 803, 111 Ind. 289 (holding the rule equally applicable in criminal cases). In *Boston & W. R. Corp. v. Dana*, 1 Gray, 83, 104, Bigelow, J., says: "It should only be done where books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements, and even in such cases they should not be admitted, unless verified by persons who have prepared them from the originals in proof, and who testify to their accuracy, and after ample time has been given to the adverse party to examine them and test their correctness." But this is discretionary with the court. *Von Sachs v. Kretz*, 72 N. Y. 548, affirming 10 Hun, 95 (holding it not error to refuse to allow a witness with the books before him to give a summary where it did not appear that expert testimony was necessary).

## § 152. The Date of Documents.

a. **Presumed to be That Given.**—It is frequently necessary, in the proper construction of a document and the circumstances surrounding it, to introduce evidence tending to show its proper date, and in this connection it is well to aver that the date given

is presumed to be the time of the delivery and execution. *Chickering v. Failes*, 26 Ill. 507; *Savery v. Browning*, 18 Iowa, 246; *Dodge v. Hopkins*, 14 Wis. 631; *Smith v. Battens*, 1 Mood. & R. 341; *Anderson v. Weston*, 6 Bing. N. C. 296; *Sinclair v. Baggalay*, 4 Mees. & W. 312; *Morgan v. Whitmore*, 6 Exch. 726; *Fowler v. Merrill*, 52 U. S. 11 How. 375, 13 L. ed. 736; *Smith v. Porter*, 10 Gray, 66; *Breck v. Cole*, 4 Sandf. 79; *People v. Snyder*, 41 N. Y. 518; *Ellsworth v. Central R. Co.* 34 N. J. L. 93; *Claridge v. Klett*, 15 Pa. 255; *Glenn v. Grover*, 3 Md. 212; *Williams v. Woods*, 16 Md. 220; *Meadows v. Cozart*, 76 N. C. 450; *Abrams v. Pomeroy*, 13 Ill. 133; *Malpas v. Clements*, 19 L. J. Q. B. 435.

A deed is considered as executed on the nominal date, unless the contrary be made to appear; it speaks from the day of delivery; and it is valid whether it bears no date, or has a false or impossible date, provided the real day when it was given can be established. 2 Bl. Com. 304, 307; *Raines v. Walker*, 77 Va. 92 (1883), and cases cited; *United States v. Le Baron*, 60 U. S. 19 How. 73, 15 L. ed. 525; *Sweetser v. Lowell*, 33 Me. 446.

**b. This Presumption Open to Rebuttal.**—This presumption as to date, like all presumptions, is open to explanation and rebuttal; any evidence designed to show that the date specified is an error or for any reason contrary to the fact is competent. *Anderson v. Weston*, 6 Bing. N. C. 296; *Sweetser v. Lowell*, 33 Me. 446; *Bird v. Munroe*, 66 Me. 337; *Fowle v. Coe*, 63 Me. 245; *Cole v. Howe*, 50 Vt. 35; *Cady v. Eggleston*, 11 Mass. 282; *Dyer v. Rich*, 1 Met. 180; *Clark v. Houghton*, 12 Gray, 38; *Goddard v. Sawyer*, 9 Allen, 78; *Draper v. Snow*, 20 N. Y. 331; *Breck v. Cole*, 4 Sandf. 79; *Serviss v. Stockstill*, 30 Ohio St. 418; *Abrams v. Pomeroy*, 13 Ill. 133; *Meldrum v. Clark*, Morris, 130; *Cook v. Knowles*, 38 Mich. 316; *Dodge v. Hopkins*, 14 Wis. 630; *Stockham v. Stockham*, 32 Md. 196; *Perrin v. Broadwell*, 3 Dana, 597; *Kimbro v. Hamilton*, 2 Swan, 190; *Pressly v. Hunter*, 1 Speers, L. 133; *McCrory v. Caskey*, 27 Ga. 54; *Miller v. Hampton*, Ala. Sel. Cas. 357; *McComb v. Gilkey*, 29 Miss. 146; *Gately v. Irvine*, 51 Cal. 72; *Richardson v. Ellett*, 10 Tex. 190. See *Clark v. Akers*, 16 Kan. 166.

Where a guaranty is written at the foot of a contract, upon the same paper, the principal contract being dated, but the guaranty without any separate date, a presumption may arise, in the absence of all proof to the contrary, that the contract and guaranty were



both executed at the same time, especially where the consideration of the principal contract is executory. There is no doubt that it would be entirely competent for the plaintiff, upon trial, to prove by parol that the papers were simultaneously executed. Whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol; not merely to supply an omission, where the paper itself is without date, but in opposition to the date, where it contains one. The time when a contract is executed is no more a part of the contract than the place where it is executed. Both belong to that class of attending and surrounding circumstances which may always be resorted to for assistance in explaining and applying the terms of the contract. *Draper v. Snow, supra.*

c. **Views of Sir James Stephen.**—Such language as that above quoted dispels all obscurity as regards the juridical view of this subject, and it may be said with entire propriety that the point has ceased to be a matter of controversy. As indicative of the repose entire unanimity of decision has given to this once agitated subject I excerpt a sentence from art. 92 of Stephen's Digest. Read in connection with the two articles preceding it affords a comprehensive view of the recent regulations pertaining to documentary evidence and the language referred to is singularly apt and expressive: "Any person other than a party to a document or his representative in interest may . . . prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document."

Notwithstanding the singularly expressive nature of the language quoted we venture upon a cautionary remark. Suppose a writing to be deficient as to its date, or, having a date, a question arises as to its accuracy, whatever may be the situation as between parties to the instrument, it is abundantly settled that, as between a party and a stranger, evidence is competent to show a date in the total absence of one, or another date from that alleged. In *Lee v. Adsit*, 37 N. Y. 78, it is said that "The rule that parol extrinsic evidence shall not be received to contradict or vary a contract which is in writing applies only in controversies between the parties, promisor and promisee, in such contract;" and that "The

writing is not conclusive as between one of the contracting parties and third persons." And in *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, it was held that "The rule that parol testimony may not be given to contradict a written contract, applies only in suits between the parties to it or their privies. . . . In a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument."

**d. Date is Not of the Essence of the Contract.**—Written instruments generally take effect from the day of their date, but the actual date of execution may be shown, though different from that which the instrument bears; and it is said that the date is not of the essence of a contract, but is essential to the identity of the writing by which it is to be proved (*Bouv. Law Dict.* title *Date*); and where there is evidence of the existence of several instruments of the same date between the same parties and relating to the same subject matter they may be construed as part of one contract. *Vice Chancellor Kent*, in *Van Horne v. Crain*, 1 Paige, 455, 2 L. ed. 713; *Rawson v. Lampman*, 5 N. Y. 456; *Mott v. Richtmyer*, 57 N. Y. 49.

§ 153. **Duplicate Documents as Evidence.**—"Duplicate," written across the face of a draft, given to replace a lost draft of the same tenor, imports that the draft is to take the place of the original, and that no new liability is created by it. *Benton v. Martin*, 40 N. Y. 347 (1869).

Each duplicate writing is complete evidence of the intention of the parties. The deliberate destruction of one, as of a duplicate will, creates a presumption that the other was also to be destroyed. 1 Whart. Ev. § 74; 1 Greenl. Ev. § 558. See *Secondary Evidence*.

A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties. When a duplicate is destroyed, for example in the case of a will, it is presumed both are intended to be destroyed; but this presumption possesses greater or less force, owing to circumstances. *Bouv. Law Dict.* title *Duplicate*.

## § 154. **Discovery and Inspection of Documents.**

**a. General Rules Regulating the Subject.**—There are certain general rules which regulate applications for discovery and inspection, one of which is that the petition must state what in-

formation is wanted, and that the books referred to contain such entries. It is not enough to show that they probably will furnish the desired information; and an application for the discovery of documents was denied, where the petition did not point to the places where the information sought for existed, nor describe the entries except by stating their supposed effect. *Dickie v. Austin*, 65 How. Pr. 420.

In *Cutter v. Pool*, 3 Abb. N. C. 130, the court denied the application, leaving the plaintiff to procure whatever books he required upon the trial by the ordinary process of *subpœna duces tecum*.

The rule that a discovery is proper when facts and circumstances are shown that warrant a presumption that a book or document contains evidence that will prove or tend to prove some facts that the party applying is bound to establish; and that absolute proof that the documentary proof exists is not required,—applied in an action for negligence causing personal injury, brought against the alleged proprietors of a certain show, where the facts shown warranted the presumption that the defendants were the proprietors of such show. *Ahlmyer v. Healy*, 12 N. Y. S. R. 677.

**b. Demand and Refusal Must be Shown.**—Discovery and inspection of books and papers should not be ordered until the applicant has demanded and been refused the privilege sought. *Gross v. Bock*, 14 N. Y. Civ. Proc. Rep. 314.

**c. Part of the Ordinary Equity Procedure.**—Discovery may be, and ordinarily is an incident of every equitable action. It is a part of the ordinary equity procedure that whatever be the relief sought, and whether the jurisdiction be exclusive or concurrent, the plaintiff may, by means of allegations and interrogatories contained in his pleading, compel the defendant to disclose by his answer facts within his own personal knowledge which may operate as evidence to sustain the plaintiff's contention. The name "discovery" is also given to this process of probing the defendant's conscience and of obtaining admissions from him, which accompanies almost every suit in equity; but it should not be confounded with "discovery" in its original and strict signification, nor with that mentioned in equity jurisprudence, which is sometimes made the ground for extending the concurrent jurisdiction

of equity over cases otherwise belonging to the domain of the common-law courts. Pom. Eq. Jur. § 144.

An order for the discovery of books and papers is one affecting a substantial right, and is appealable. Where, on an application for an order for the discovery of books and papers, the entries sought for are not shown to be evidence, but only to contain information by which evidence may be obtained, the order cannot be granted. The power of discovering the contents of a written document will hardly be stretched to cover those which only furnish information to enable the applicant to ferret out evidence of witnesses; or where it is not shown that witnesses cannot establish the same facts without the aid of such entries. *Woods v. De Figaniere*, 25 How. Pr. 522; *Gelston v. Hoyt*, 1 Johns. Ch. 543, 1 L. ed. 240.

One rule adopted in enforcing the production of written instruments was that it should appear that they were indispensably necessary. *Woods v. De Figaniere*, 1 Robt. 688; *Pegram v. Carson*, 18 How. Pr. 524. Such trials are not to be delayed, and discoveries required, when the necessity of such delay and discovery is not made to appear. *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 136.

It must also be shown that the party applying had not the means of obtaining the facts, without such discovery (*Seymour v. Seymour*, 4 Johns. Ch. 411, 1 L. ed. 886. See *Duvals v. Ross*, 2 Munf. 290); and that he is unable to prove such facts by other testimony. *Lindsley v. James*, 3 Coldw. 484. See *Whitesides v. Lafferty*, 9 Humph. 27. A suit in equity for a discovery may be maintained by the plaintiff in an action at law against the defendant therein, or by the defendant in an action at law against the plaintiff therein, to obtain evidence material to his cause of action or to his defense. See *Kearny v. Jeffries*, 48 Miss. 343; *Heath v. Erie R. Co.* 9 Blatchf. 316; *Shotwell v. Smith*, 20 N. J. Eq. 79; 1 Pom. Eq. Jur. 181.

**d. In Most Instances a Matter of Statutory Law.**—The statutory law of many States allows discovery and inspection of documents before trial, as a means calculated to further the ends of justice, and expedite the course of litigation. N. Y. Code Civ. Proc. §§ 803–809; Mass. Pub. Stat. chap. 167, §§ 49–60; Cal. Code Civ. Proc. § 1000; Colo. Code Civ. Proc. § 355.

All courts of record possess this power, and it is exercised in favor of any party to an action pending in such a court. *Par-*

*sons v. Belden*, 9 Abb. N. C. 54; *Smith v. Macdonald*, 52 How. Pr. 117, 1 Abb. N. C. 350; *Brett v. Buckman*, 32 Barb. 655; *People v. Dyckman*, 24 How. Pr. 222; *Contra, De Bary v. Stanley*, 5 Daly, 412, 48 How. Pr. 349; *Hauseman v. Sterming*, 61 Barb. 347; *Martin v. Spofford*, 3 Abb. N. C. 125; *Havemeyer v. Ingersoll*, 12 Abb. Pr. N. S. 301. See *Boorman v. Atlantic & P. R. Co.* 78 N. Y. 599; *King v. Leighton*, 58 N. Y. 383; *Gaughe v. Laroche*, 14 How. Pr. 451; Greenl. Ev. § 300; 2 Barb. Ch. Pr. 101; *Re Emma Silver Min. Co.* 12 Moak, Eng. Rep. 701; *Costa Rica v. Erlanger*, 11 Moak, Eng. Rep. 653.

**e. New York Provisions Regulating the Subject.**—"To entitle a party to procure such a discovery or inspection, he must present a petition, praying therefor, and verified by affidavit, to the court, or to a judge authorized to make an order in the action; upon which an order may be made, directing the party, against whom the discovery or inspection is sought, to allow it, or, in default thereof, to show cause before the court, at a time and place, and upon a notice therein specified, why the prayer of the petition should not be granted; and, if necessary or proper, that his proceedings may be stayed until the hearing of the application, although the stay exceeds twenty days." N. Y. Code Civ. Proc. § 805.

**f. Order, When and by Whom Vacated.**—Ample provision exists for protecting parties litigant against any improvident exercise of this right, as will be seen by the following: "An order, made as prescribed in the last section, may be vacated by the judge who granted it, or by the court upon satisfactory proof, by affidavit,—

I. That it ought not to have been granted, or that it has been complied with; or

II. That the party required to make the discovery, or permit the inspection, has not the possession or control of the book, document, or other paper, directed to be produced or inspected." N. Y. Code Civ. Proc. § 806.

**g. Proceedings upon Return of the Order.**—"Upon the return of the order to show cause, the court may make such an order with respect to the discovery or inspection prayed for, as justice requires. Where either is directed, a referee may be appointed by the order to direct and superintend it; whose certificate, unless set aside by the court, is presumptive, and, except in proceedings

for contempt, conclusive evidence of compliance or non-compliance with the terms of the order. A fixed sum, not exceeding twenty dollars, may be added to the costs of the motion, for the fees of the referee." N. Y. Code Civ. Proc. § 807.

**h. Principles of This Code Widely Accepted.**—The principles incorporated in the New York Code, as above quoted, have met with cordial approbation in sister States, and given a new impulse to the effective portraiture of the facts underlying legal controversy. A system which can and does compel the production of necessary evidence in the manner above outlined has made vast strides toward perfection, and throws many discouragements in the path of the pettifogger or the trickster. As an illustration of the wide acceptance and indorsement of the rules embodied in the New York Code, I cite the practitioner to the rule in California. Cal. Code Civ. Proc. § 1000.

The Colorado practice embodies the ideal utterance of the entire code system on this subject. Its system of procedure has been so recently adopted, that its judiciary committee, in drafting the Act, naturally availed themselves of the accumulated experience of the other States under the operation of these peculiar laws, and have produced a rule of exceptional merit regarding this topic of inspection and notice. The language of this rule is as follows: "Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other within a specified time, an inspection or copy, or permission to take a copy of any book, document or paper in his possession or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence; or if wanted as evidence, by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness." Colo. Code Civ. Proc. § 355.

**i. Rule in the Federal Courts.**—It has been held in the Southern District of New York that inspection of a document before trial at common law can only be obtained by a bill of discovery, not by an order, in accordance with the State practice. *Guyot v. Hilton*, 32 Fed. Rep. 743; *Colgate v. Compagnie Fran-*

*caise*, 23 Fed. Rep. 82. But see *Coit v. North Carolina Gold Amalgamating Co.* 9 Fed. Rep. 577.

The statutes provide that on the trial of an action at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. *Ibid.*

If a plaintiff fails to comply with such an order, the court may, on motion, give the like judgment for the defendants as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default. *Ibid.*

It has been held that this practice will be followed in equity. *Coit v. North Carolina Gold Amalgamating Co.* 9 Fed. Rep. 577. But see *Guyot v. Hilton*, 32 Fed. Rep. 743; *Colgate v. Compagnie Francaise*, 23 Fed. Rep. 82; *Bischoffsheim v. Brown*, 29 Fed. Rep. 341.

The pendency of a bill of discovery is not a bar to such a motion in an action at law. *Iasigi v. Brown*, 1 Curt. 401.

The order will not be granted unless the applicant shows that the paper exists and is pertinent to the issue, and in the possession of the other party. *Iasigi v. Brown*, 1 Curt. 401; *Triplett v. Bank of Washington*, 3 Cranch, C. C. 646; *Jacques v. Collins*, 2 Blatchf. 23; *Bas v. Steele*, 3 Wash. C. C. 381.

The order may be absolute or conditional. *Dunham v. Riley*, 4 Wash. C. C. 126; *Iasigi v. Brown*, 1 Curt. 401; *Merchants Nat. Bank v. State Nat. Bank*, 3 Cliff. 201.

A motion made at the trial is too late. *Sampson v. Johnson*, 2 Cranch, C. C. 107; *Bank of United States v. Kurtz*, 2 Cranch, C. C. 342.

If the notice was not served a sufficient length of time before the trial, the trial may be postponed. *Geyger v. Geyger*, 2 U. S. 2 Dall. 332, 2 L. ed. 403; *Bank of United States v. Kurtz*, 2 Cranch, C. C. 342.

It has been said that such an order should not be made against a corporation, the proper remedy in such a case being a *subpœna duces tecum* served on one of its officers. *Merchants Nat. Bank v. State Nat. Bank*, 2 Cliff. 201.

The order may require that the documents be filed with the

clerk, or that copies of them be served on the parties seeking them. *Jacques v. Collins*, 2 Blatchf. 23; Foster, Fed. Pr. § 372 (1890).

Further elaboration of this subject is reserved for the chapter on *Depositions, Post*.

**f. Comment of Professor Pomeroy.**—Commenting upon this subject of discovery, Mr. Pomeroy says this incident of chancery pleading, so entirely at variance from the common-law practice, by which the conscience of the defendant could be probed, and which was so powerful an instrument in eliciting the truth in judicial controversies, has been essentially adopted by the reformed system of procedure. Under that procedure this chancery mode of pleading for the purpose of eliciting facts, as well as presenting issues, has been essentially applied to all equitable suits, except those causes of action in which the defendant's omissions might expose him to criminal prosecution, penalties and the like. But this is not the discovery now under consideration. The distinction here pointed out should be most carefully observed, or else the whole subject will become confused and uncertain. Unfortunately the decisions, especially American, while speaking of the discovery, have not been always careful to distinguish between the "discovery" which is a constant incident to the obtaining of relief in every equity suit, and the "discovery" which is a branch of the auxiliary jurisdiction, obtained in a separate suit without any relief. Rule and modes applicable alone to the latter have sometimes been spoken of as belonging to the former, and *vice versa*.

Discovery proper is, in its essential conception, merely an instrument of procedure, unaccompanied by any direct relief sought by the party in some other judicial controversy. The suit for discovery, properly so called, is a bill filed for the sole purpose of compelling the defendant to answer its allegations and interrogatories, and thereby to disclose facts within his own knowledge, information and belief, or to disclose and produce documents, books and other things within his possession, custody or control, and asking no relief in the suit, except it may be a temporary stay in the proceedings in another suit to which the discovery relates. As soon, therefore, as the defendant has put in his answer, containing a full discovery of all the matters and things which he is obliged, according to the principles and doctrines of equity on the subject, to disclose, the object of the suit has been accom-



plished, and the suit itself is ended; nothing remains to be done but to use this answer as evidence in the judicial proceeding to which this discovery was collateral. *Jeremy*, Eq. Jur. 257, 258; 1 *Spence*, Eq. Jur. 677, 678; *Adams*, Eq. 20, marg. p. 89 (6th Am. ed.); *Shaftsbury v. Arrowsmith*, 4 Ves. Jr. 71; *Kearny v. Jeffries*, 48 Miss. 343; *Heath v. Erie R. Co.* 9 Blatchf. 316; *Shotwell v. Smith*, 20 N. J. Eq. 79.

This branch of the auxiliary jurisdiction may be invoked, and the suit in equity for a discovery may be maintained by the plaintiff in an action of law, against the defendant therein, or by the defendant in an action of law, against the plaintiff therein, in order to obtain evidence material to his cause of action or to his defense, as the case may be, and this is undoubtedly its most common purpose; also by the defendant in a suit in equity, in the form of a cross-bill against the complaint therein, in order to obtain a disclosure of facts necessary to enable him to properly frame his answer to the original bill, or to obtain a disclosure of facts material as evidence on his behalf at the hearing upon the original bill and answer thereto (*King of Spain v. Hullet*, 1 Clark & F. 333; *Prioleau v. United States*, L. R. 2 Eq. 659, L. R. 3 Eq. 724; *Columbian Government v. Rothschild*, 1 Sim. 94; *Millsaps v. Pfeiffer*, 44 Miss. 805); and also, under some circumstances, by the moving party or petitioner in some proceeding in the court of equity to avoid the necessity or to escape the difficulty of procuring the evidence in that proceeding. It is not, however, essential to a bill of discovery that it should be the only means which the complainant has of procuring evidence in support of his collateral cause of action or defense; that is, it is not necessary that the complainant should otherwise be destitute of proof or of the means of obtaining it.

The bill for a discovery is proper, either when the complainant therein has no other proof than that which he expects by its means to obtain from the defendant, or when he needs the matters thus disclosed to supplement and aid other evidence which he has, or, indeed, whenever the court can fairly suppose that facts and circumstances discovered by means of the bill can be in any way material to the complainant therein in maintaining his cause of action or defense in a suit. *Peck v. Ashley*, 12 Met. 478; *Thomas v. Tyler*, 3 Young & C. Exch. 255.

The following are some of the most recent instances of the exercise of this jurisdiction of the American equity courts. *Con-*

*tinental L. Ins. Co. v. Webb*, 54 Ala. 688; *Merchants Nat. Bank v. State Nat. Bank*, 3 Cliff. 201; *Hoppock v. United N. J. R. & C. Co.* 27 N. J. Eq. 286; *French v. Rainey*, 2 Tenn. Ch. 640; *French v. First Nat. Bank of New York*, 7 Ben. 488; *Kearny v. Jeffries*, 48 Miss. 343; *Heath v. Erie R. Co.* 9 Blatchf. 316; *Buckner v. Ferguson*, 44 Miss. 677; *Shotwell v. Smith*, 20 N. J. Eq. 79; 1 Pom. Eq. Jur. § 191.

**k. Statement of a Recent Rule.**—The general rule is that the party seeking discovery of documents must be satisfied with his opponent's affidavit on the subject. He cannot cross-examine or give evidence contradicting it. See *Robbins v. Davis*, 1 Blatchf. 238. The statutory authority to order a company to bring its books into the State does not embrace, by implication, authority to order it to bring all its papers and memoranda there also. See *Huyler v. Cragin Cattle Co.* 5 Cent. Rep. 645, 42 N. J. Eq. 139. Where one defendant desires to inspect a writing in possession of a co-defendant, the proper practice is to compel such inspection by cross-bill, not by petition, except in case of copartners. See *Evans v. Staples*, 6 Cent. Rep. 554, 42 N. J. Eq. 584.

**1. The Rule Construed in Its Application to Books of Account.**—In an action by a corporation against its superintendent for money which his accounts rendered to the corporation showed to be due it, and which it was alleged that he had refused to repay and converted to his own use,—*Held*, proper to grant an order allowing defendant to inspect the account books kept by defendant as superintendent of the plaintiff, and the balance-sheet and vouchers in support thereof, especially as plaintiff charged that the accounts had been falsified. *Inyo Mining Co. v. Pheby*, 17 Jones & S. 392.

A petition for leave to search through the defendants' account books for isolated entries, in order to ascertain the names of persons to whom defendants had sold goods in violation of their agreement, and thus enable plaintiff to frame a complaint was denied, as the verified petition stated that defendants had sold largely to other persons, so that it appeared that such examination of defendants' books was unnecessary. *Moffat v. Henderson*, 18 Jones & S. 211; *Mchesy v. Kahn*, 18 Jones & S. 209, 6 N. Y. Civ. Proc. Rep. 33.

Application for discovery of employer's accounts, without stating what, asked for by a salesman to enable him to prepare for

trial of his action for commissions on sales, denied, because special circumstances were not stated to bring the case within the rule in *Cutter v. Pool*, 3 Abb. N. C. 130; *Dickie v. Austin*, 65 How. Pr. 420.

**m. What is Embraced Within the Purview of This Rule.**

—In this country the records, public books and by-laws of municipal corporations are of a public nature, and if such a corporation should refuse to give inspection thereof, to any person having an interest therein, or, perhaps, for any proper purpose to any inhabitant of the corporation, whether he had any special or private interest or not, a writ of mandamus would lie to command the corporation to allow such inspection, and copies to be taken, under reasonable precautions to secure the safety of the originals. *Dillon, Mun. Corp.* (3d ed.) §§ 303, 848; *People v. Reilly*, 38 Hun, 433. See *Hawes v. White*, 66 Me. 305; *O'Hara v. King*, 52 Ill. 303; *State v. Rachac*, 37 Minn. 372; *Diamond Match Co. v. Powers*, 51 Mich. 145, 8 Am. & Eng. Corp. Cas. 144; *Cormack v. Wolcott*, 37 Kan. 391.

Where the claim is for the continuous use of the record office and its public contents, from day to day and week to week, and not merely for a single occasion, with all its material facts defined, there must be great if not insuperable difficulty in enforcing the claim by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile. *Diamond Match Co. v. Powers*, 51 Mich. 145, 8 Am. & Eng. Corp. Cas. 144.

In *Buck v. Collins*, 51 Ga. 395, the court said: "But no person has the right to examine or inspect the records in his office except in his (clerk's) presence and under his observation. If he may do this for a minute, the clerk is not keeping them safely and securely. A blot or scratch may be made in a minute that may alter a record. A leaf may be extracted in a minute; and if one man may of right take a record book and abstract its contents, work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right; and if this may be done except under the clerk's immediate

inspection, no record can be safely kept." See also *Bean v. People*, 7 Colo. 200.

**n. Substantial Re-enactment of the Rule by the English Parliament.**—The English rules which regulate the production and inspection of documents by a witness not a party to the action are concisely given by Mr. Stephen, and as they are of recognized applicability in the practice before the American courts a re-statement of the English law is considered opportune.

"No witness who is not a party to a suit can be compelled to produce his title-deeds to any property, or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture; but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action, or because he has a lien upon it.

"No solicitor, trustee or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust* or mortgagor would be entitled to refuse to produce if they were in his possession; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents." Steph. Dig. Ev. Arts. 118, 119.

**§ 155. What Evidence may be Given for the Interpretation of Documents.**—The English rule in reference to this subject is embodied in Stephen's Digest, art. 91:

"(1). Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

"(2). In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense; but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.

"(3). If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.

“(4). In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Such facts are hereinafter called the circumstances of the case.

“(5). If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.

“(6). If the document has one distinct meaning in reference to the circumstances of the case it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.

“(7). If the document applies in part but not with accuracy or not completely to the circumstances of the case, the court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and to his habitual use of language or names for particular persons or things.

“(8). If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.

“(9). If the document is of such a nature that the court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.”

Of course, every document whatever must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore, in every case whatever, every fact must be allowed to be proved to which the document does, or probably may refer. *Steph. Dig. Ev. note 33.*

## CHAPTER VIII.

### PAROL EVIDENCE.

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§ 156. **The Term Defined.**—The best definition obtainable is from Stephen's Digest, art. 1, (1) parol evidence consists of "statements made by witnesses in court, under a legal sanction, in relation to matters of fact under inquiry."

Ordinarily the most natural and satisfactory method of proving the existence or non-existence of any fact, is by the direct oral testimony of witnesses who have perceived its existence or non-existence by the operation of their own senses or consciousness, and therefore this is the means most generally resorted to for that purpose; and it is permissible to employ it in all cases, excepting (1) where the fact sought to be established or denied is in contradiction of a conclusive presumption of law; or (2) unless it be a transaction of a public nature of which the law requires an official record to be kept; or (3) unless the fact to be proved be the contents of a document; or (4) the terms of some contract or grant which the parties have reduced to writing, and which is sought to be proved by a party thereto, or his representative in interest, for the purpose of enforcing, varying or denying some right or liability thereunder. Subject to these exceptions, which will be considered practically hereafter, all the ultimate facts which form the ground of the decision of a court or jury upon an issue of fact (excepting such facts as are admitted or judicially noticed, and those which actually take place at the trial), are required to be established by direct oral evidence. It should be added that the term includes all testimony given by signs or writing by witnesses unable to speak. Reynolds, Theory of Law of Ev. § 58.

Much of the early learning on this subject has become obsolete and oblivionized as a direct result of the encouragement and expansion given to the remedial principles of the American equity ju-



risprudence. Under the arbitrary assumptions of the common law, parol evidence had been reduced to a pigmean condition of uselessness in so far as it possessed any function for effecting contractual matters contained in the recitals of a written instrument.

Few axioms of law have a more extended application, or are so universal in their application as that which denies to parol evidence the right to explain, vary or contradict the terms of a written instrument.

§ 157. **The General Rule Rejecting.**—*Judge* Danforth in a recent case (*Chapin v. Dobson*, 78 N. Y. 74) formulates the principle in suggestive language when he says: "The general rule requires the rejection of parol evidence when offered to cut down or take away obligations entered into between parties and by them put in writing. And the reason of the rule suggests its application and its limitation."

"It would be inconvenient," says *Lord Coke* (5, 60, 26 a) "that matters in writing made by advice and on consideration and which finally import the certain truth of the agreement between the parties, should be controlled by an averment of the parties to be proved by the uncertain testimony of slippery memory."

An unbroken array of authorities might be cited in support of this well known rule. Every jurisdiction in this country without exception, has given indorsements to the rule stated in the text, and while great misconception and contrariety of view exists as to the nature and scope of the numerous exceptions which have obtained recognition in every State, and have engrafted themselves tenaciously upon the original formula, still it may be affirmed without fear of contradiction that wherever the evidentiary facts disclose a pertinent case, the courts with uniform consistency apply in all its rigor the provisions of the law as stated. *Eveleth v. Wilson*, 15 Me. 109; *Peterson v. Grover*, 20 Me. 363; *Morrill v. Robinson*, 71 Me. 24; *Smith v. Gibbs*, 44 N. H. 335; *Bradley v. Bentley*, 8 Vt. 243; *Brandon Mfg. Co. v. Morse*, 48 Vt. 322; *Myrick v. Dame*, 9 Cush. 248; *Finney v. Bedford Commercial Ins. Co.* 8 Met. 348; *Fay v. Gray*, 124 Mass. 500; *Drake v. Starks*, 45 Conn. 96; *La Farge v. Rickert*, 5 Wend. 187; *Spencer v. Tilden*, 5 Cow. 144; *Clark v. New York L. Ins. & T. Co.* 7 Lans. 323; *Dalrymple v. Van Syckel*, 32 N. J. Eq. 826; *Perrine v. Cheeseman*, 11 N. J. L. 207; *Carlton v. Vineland Wine Co.* 33 N. J. Eq. 466; *Heilner v. Imbrie*, 6 Serg. & R. 401; *Hagey v.*

*Hill*, 75 Pa. 108; *Pennsylvania & N. Y. Canal Co. v. Betts*, 1 Weekly Notes, 368; *Weiler v. Hottenstein*, 102 Pa. 499; *Woodruff v. Frost*, 2 N. J. L. 322; *Young v. Frost*, 5 Gill, 287; *Batturs v. Sellers*, 6 Har. & J. 249; *Criss v. Withers*, 26 Md. 553; *Farrow v. Hayes*, 51 Md. 498; *Baltimore Perm. Bldg. & L. Soc. v. Smith*, 54 Md. 187; *Hunting v. Emmart*, 55 Md. 265; *McLean v. Piedmont & A. L. Ins. Co.* 29 Gratt. 361; *Little Kanawha Nav. Co. v. Rice*, 9 W. Va. 636; *Serviss v. Stockstill*, 30 Ohio St. 418; *Irwin v. Ivers*, 7 Ind. 308; *Davis v. Liberty & C. G. Road Co.* 84 Ind. 36; *Trentman v. Fletcher*, 100 Ind. 105; *Seckler v. Fox*, 51 Mich. 92; *McClure v. Jeffrey*, 8 Ind. 79; *Abrams v. Pomeroy*, 13 Ill. 133; *Belcher v. Mulhall*, 57 Tex. 17; *Pickett v. Ferguson*, 45 Ark. 177; *Koehring v. Muemminghoff*, 61 Mo. 403; *Porter v. Sandidge*, 32 La. Ann. 449; *Elliott v. Connell*, 5 Smedes & M. 91; *Tennessee & C. R. Co. v. East Alabama R. Co.* 73 Ala. 426; *Duff v. Ivy*, 3 Stew. 140; *Smith v. Odom*, 63 Ga. 499; *Falconer v. Garrison*, 1 McCord, L. 209; *Mayer v. Adrian*, 77 N. C. 83; *Chamness v. Crutchfield*, 2 Ired. Eq. 148; *Lemaster v. Burckhart*, 2 Bibb, 25; *Ruiz v. Norton*, 4 Cal. 359; *Gillespie v. Sawyer*, 15 Neb. 536; *Lennard v. Vischer*, 2 Cal. 37; *Winona v. Thompson*, 24 Minn. 199; *Schultz v. Coon*, 51 Wis. 416; *Dickson v. Harris*, 60 Iowa, 727.

The principle object of the rule under discussion is to protect the honest, accurate and prudent in making contracts, against fraud and false swearing, carelessness and inaccuracy by furnishing evidence of what was intended by the parties which can always be produced without fear of change, or liability to misconstruction. *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 13 Wall. 231, 20 L. ed. 621.

§ 158. **Not Admissible to Vary the Terms of a Written Instrument.**—It is an elementary doctrine that parol evidence is not in general admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted, or made in pursuance of a legal necessity. *Croome v. Lediard*, 2 Myl. & K. 251. It is equally well settled that mistake, fraud, surprise and accident furnish exceptions to this otherwise universal doctrine. Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments upon the ground of mistake, surprise, fraud and accident. This exception rests upon the highest motives of policy and expediency; for other-

wise an injured party would be without remedy. Even the Statute of Frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong. 2 Pom. Eq. Jur. § 858.

The following American cases illustrate the exception by which parol evidence may be admitted to vary written instruments, on the ground of mistake, in different forms and modes of proceedings: *Peterson v. Grover*, 20 Me. 363; *Bradbury v. White*, 4 Me. 391; *Rogers v. Saunders*, 16 Me. 92; *Goodell v. Field*, 15 Vt. 448; *Lawrence v. Staigg*, 8 R. I. 256; *Quinn v. Roath*, 37 Conn. 16; *Canterbury Aqueduct Co. v. Ensworth*, 22 Conn. 608; *Patterson v. Bloomer*, 35 Conn. 57; *Margraf v. Muir*, 57 N. Y. 155; *Best v. Stow*, 2 Sandf. Ch. 298, 7 L. ed. 601; *White v. Williams*, 48 Barb. 222; *Morganthau v. White*, 1 Sweeney, 395; *Ryno v. Darby*, 20 N. J. Eq. 231; *Conover v. Wardell*, 20 N. J. Eq. 266; *Perry v. Pearson*, 1 Humph. 431; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Chambers v. Livermore*, 15 Mich. 381; *Van Ness v. Washington*, 29 U. S. 4 Pet. 232, 7 L. ed. 842.

In the California Code of Civil Procedure, the general doctrine and the exceptions are formulated as follows: § 1856. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives or successors in interest, no evidence of the terms of the agreement other than the contents of the writing except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, . . . or to explain an extrinsic ambiguity or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties." See 2 Pom. Eq. Jur. § 858, *note*.

The judicial interpretation of the section cited from the California Code of Civil Procedure abundantly sustains the propositions contended for. The California courts have evidently availed themselves of the latest expressions of juridical comment upon this subject, and the principles governing the topic, that have obtained wide acceptance and recognition in other jurisdictions, have been abundantly vindicated and upheld in this. A brief

reference is made to the decisions referred to, as they are in high repute throughout the western states, and are universally regarded as very logical expositions of the existing law.

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument. Civ. Code, § 1625; *Goldman v. Davis*, 23 Cal. 256; *Guy v. Bibend*, 41 Cal. 325; *Ward v. McNaughton*, 43 Cal. 159. The rule does not apply where the oral testimony goes to prove the theory of the case of the party objecting to the admission of the evidence. *Hobbs v. Duff*, 43 Cal. 489. The rule is confined to controversies between parties and those claiming under them. *Hussman v. Wilke*, 50 Cal. 250. Nor has it any application to a controversy to which a stranger is a party. *Smith v. Moynihan*, 44 Cal. 54; *Kridner v. Lafferty*, 1 Whart. 314; *Edgerly v. Emerson*, 23 N. H. 564. The principle that no evidence of the terms other than the contents of the writing is admissible, is affirmed in *Osborn v. Hendrickson*, 7 Cal. 285; also where defendant claimed he was only a surety. *Kritzer v. Mills*, 9 Cal. 23; *Aud v. Magruder*, 10 Cal. 288. An action against vendor for alleged breaches, outside of covenants in deed. *Peabody v. Phelps*, 9 Cal. 228. Claim by tenant that there was a contemporaneous oral agreement outside of his lease, that he might remove buildings. *Jungerman v. Bovee*, 19 Cal. 364. Attempt to contradict the terms of a conveyance. *Donahue v. McNulty*, 24 Cal. 416. Attempt to show that a bond purporting to be the obligations of individuals was the bond of a corporation. *Richardson v. Scott River, W. & M. R. Co.* 22 Cal. 155. So where oral testimony of the contents of a letter was sought to be introduced. *Hewlett v. Steele*, 11 Pac. C. L. J. 30.

In an action by a *cestui que trust* against a trustee to enforce the trust, parol evidence on the absence of fraud or mistake in making the deed, will not be received on behalf of the trustee named in the deed which seeks to establish that he and not the *cestui que trust* was the beneficiary. *Young America Engine No. 6 v. Sacramento*, 47 Cal. 594. A resulting trust may be defeated, as well as established by parol evidence. *Bayles v. Baister*, 22 Cal. 580. If oral testimony is received as to a contract, etc., which it afterwards appears was reduced to writing, such testimony should be stricken out. *Crary v. Campbell*, 24 Cal. 636.

Under the modern, and it would seem the controlling adjudications on the subject, there can be no doubt as to the verity of the legal proposition cited in the text.

§ 159. **Apparent Exception to This General Rule.**—Accuracy requires us to note an apparent exception to the rule as stated. In Pennsylvania parol evidence to vary a written agreement is admitted with great freedom. In *Greenarwalt v. Kohne*, 85 Pa. 369, 375, Sharswood, *J.*, said: "It is agreed that the English rule, excluding parol evidence to vary a written contract, has not been adopted in this State in all its stringency. The exceptions indeed have almost eaten out the heart of the rule itself, but it is not altogether abolished, as may be seen in *Martin v. Berens*, 67 Pa. 459. But from *Hurst v. Kirkbride*, decided in 1773, reported by *Ch. J.* Tilghman, in *Wallace v. Baker*, 1 Binn. 610, down to the present time, this court has uniformly held that where at the execution of a writing, a stipulation has been entered into a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, that parol evidence is admissible, though it may vary and materially change the terms of the contract." See *Miller v. Henderson*, 10 Serg. & R. 290; *Powelton Coal Co. v. McShain*, 75 Pa. 238; *Lippincott v. Whitman*, 83 Pa. 244; *Chalfant v. Williams*, 35 Pa. 212; *Graver v. Scott*, 80 Pa. 88, 94. There is one New York case which accords with the foregoing. *Chapin v. Dobson*, 78 N. Y. 74.

§ 160. **Rule Never Applies in Cases of Fraud or Mistake.**—

It is familiar law in the United States—a law exemplified in the daily proceedings of our courts of record,—that where the evidence discloses fraud or mistake in a written contract sufficient to demand in equity a reformation of the instrument, the process of the court may be set in motion to achieve this end. The complainant in such an action must allege the mistake or fraud relied upon as a ground for modification, reformation or specific enforcement, and his proofs must sustain his allegations. It is further a well recognized principle of the equitable jurisdiction, that parol evidence is admissible to sustain averments of mistake, fraud or unconscionable advantage. The leading case in this country is *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795, decided by Chancellor Kent, in 1819. The decision of the celebrated

chancellor is placed broadly and squarely upon well recognized equitable principles. I quote:

“Why should not the party aggrieved by a mistake in the agreement have relief as well where he is plaintiff as where he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the court has a competent jurisdiction to correct such mistakes,—and that is a point understood and settled—the agreement when corrected and made to speak the real sense of the parties ought to be enforced, as well as any other agreement, perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under a decree of the court, as when made accurate by the acts of the parties.” The doctrine is either directly decided or recognized by the following cases: *Bellows v. Stone*, 14 N. H. 175; *Smith v. Greeley*, 14 N. H. 378; *Tilton v. Tilton*, 9 N. H. 385; *Craig v. Kittredge*, 23 N. H. 231; *Beardsley v. Knight*, 10 Vt. 185; *Glass v. Hulbert*, 102 Mass. 24, 41; *Metcalf v. Putnam*, 9 Allen, 97; *Quinn v. Roath*, 37 Conn. 16; *Wooden v. Haviland*, 18 Conn. 101; *Chamberlain v. Thompson*, 10 Conn. 243; *Gillespie v. Moon*, 2 Johns. Ch. 585, 1 L. ed. 500; *Lyman v. United Ins. Co.* 17 Johns. 373; *Rosevelt v. Fulton*, 2 Cow. 129; *Coles v. Browne*, 10 Paige, 526, 535, 4 L. ed. 1076, 1080; *Gouverneur v. Titus*, 1 Edw. Ch. 477, 6 L. ed. 217, 6 Paige, 347, 3 L. ed. 1015; *Hyde v. Tanner*, 1 Barb. 75; *Smith v. Allen*, 1 N. J. Eq. 43; *Christ v. Diffenbach*, 1 Serg. & R. 464; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348; *Gower v. Sterner*, 2 Whart. 75; *Bowman v. Bittenbender*, 4 Watts, 290; *Clark v. Partridge*, 2 Pa. 13, 4 Pa. 166; *Wesley v. Thomas*, 6 Harr. & J. 24; *Moale v. Buchanan*, 11 Gill & J. 314, 325; *Coutt v. Craig*, 2 Hen. & M. 618; *Newsom v. Bufferlow*, 1 Dev. Eq. 379; *Brady v. Parker*, 4 Ired. Eq. 430; *Clopton v. Martin*, 11 Ala. 187; *Harris v. Columbiana County Mut. Ins. Co.* 18 Ohio, 116; *Webster v. Harris*, 16 Ohio, 490; *Worley v. Tuggle*, 4 Bush, 168, 173; *Shelby v. Smith*, 2 A. K. Marsh. 504; *Bailey v. Bailey*, 8 Humph. 230; *Leitensdorfer v. Delphy*, 15 Mo. 160; *Murphy v. Rooney*, 45 Cal. 78; *Murray v. Dake*, 46 Cal. 644.

### § 161. Equity will in all Cases Last Named Afford Relief.

—A plaintiff who invokes the aid of a court of equity in order to

establish a state of facts contradicted by the manifest recitals of a written instrument, must prove his case beyond a reasonable doubt. There must be no doubt or suspicion as regards the character and scope of the evidence by which this proof is supported, and the *onus probandi* is with the plaintiff. *Beard v. Linthicum*, 1 Md. Ch. 345; *Hunter v. Bilyeu*, 30 Ill. 228; *Bailey v. Bailey*, 8 Humph. 230; *Nevins v. Dunlap*, 33 N. Y. 676; *Lyman v. United Ins. Co.* 2 Johns. Ch. 630, 1 L. ed. 519.

In the L. C. P. Co.'s Edition of the New York Chancery Reports, a note by Mr. Desty to the case last above cited will be found suggestive in the present connection; according to the authorities there collated it seems that: The written instrument furnishes better evidence of the deliberate intentions of the party than any proof can supply, and the exceptions to the rules, originating in accident and mistake have been equally applied to written instruments within and without the Statute of Frauds. Cited in *Worley v. Tuggle*, 4 Bush, 175. See *Motteux v. London Assurance Co.* 1 Atk. 545; *Henkle v. Royal Exch. Co.* 1 Ves. Sr. 317; *Graves v. Boston M. Ins. Co.* 6 U. S. 2 Cranch, 444, 2 L. ed. 332; *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 10; *Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. 5. See also *Gillespie v. Moon*, 2 Johns. Ch. 585, 1 L. ed. 500, and *note*. It must appear that the mistake consisted in not drawing up the instrument according to the agreement made. Cited in *Tesson v. Atlantic Mut. Ins. Co.* 40 Mo. 36. See *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795; *Graves v. Boston M. Ins. Co.* 6 U. S. 2 Cranch, 419, 2 L. ed. 324.

§ 162. **Three Celebrated Cases Considered.**—The three cases of *Keisselbrack v. Livingston*, *Gillespie v. Moon*, *supra*, and *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, should be read consecutively in connection with any extended or discriminating review of this subject. They have been the theme of juridical comment for many years, and the latter case in particular, decided by Mr. Justice Wells in 1869, supports with a great display of reasoning a restrictive view that neither of the other cases suggest or enjoin. It has further been made the subject of very elaborate review by Pomeroy, in his *Equity Jurisprudence*, § 869, and the distinction which underlies the latter case is very clearly indicated in a foot note to that section. In *Gillespie v. Moon* and *Keisselbrack v. Livingston*, relief was afforded and decreed as a result of

parol evidence, which sought to vary the terms of the written contract. The evidence showed that the difference was the result of accident and mistake, and both cases hold in effect that the Statute of Frauds was not infringed in the conclusion reached. The pith and very essence of this principle is this, "The parol evidence is introduced not to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement." The learned *Chancellor* Kent remarks, "It would be a great defect in what Lord Eldon terms the 'moral jurisdiction' of the court, if there was no relief in such a case."

In *Glass v. Hubbert, supra*, it is conceded that the principle maintained by *Chancellor* Kent was fully established, but a well defined distinction was said to exist because the relief sought and granted was by way of restricting, and not by enlarging operations of the deed. The principle is the same, and equally applicable to both cases, as is apparent from the discussion of the cases by the *Chancellor* in *Gillespie v. Moon, supra*. The subsequent decisions in New York State distinctly hold that the same principle was applicable where the conveyance or agreement did not include all the land which was intended. *Wells v. Yates*, 44 N. Y. 525, opinion by Hunt, *Commissioner*, and incidentally containing a very instructive review of the subject. See *DePeyster v. Hasbrouck*, 11 N. Y. 582; *Wiswall v. Hall*, 3 Paige, 313, 3 L. ed. 168.

In the L. C. P. Co.'s edition of the New York Chancery Reports the case last above cited is made the subject of an instructive note by Mr. Desty, which reviews the authorities and states the result with conciseness and precision. From that note, valuable in every way, as expository of the subject, I extract the following paragraph: "A court of equity will not interfere to reform a contract, on the ground of a mistake, unless it is mutual. But mistake on the one side, and fraud on the other will authorize a reformation. Cited in *Welles v. Yates*, 44 N. Y. 529; *Wiest v. Garman*, 4 Houst. (Del.) 136. See *Waldron v. Stevens*, 12 Wend. 100; *Hill v. Gray*, 1 Stark. 434, applied in *VanHook v. Walton*, 28 Tex. 80, a case where an insolvent executed an instrument with a view of giving a preference."

§ 163. **A Further Expression of the General Rule—Illustrations.**—A written contract generally contains the deliberate,



definite and final agreement of the parties, and therefore parol evidence of negotiations prior to the execution of the written instrument, is inadmissible to vary or contradict the writing. *Harnor v. Groves*, 15 C. B. 667, 29 Eng. L. & Eq. 220; *Cook v. Combs*, 39 N. H. 592; *Kain v. Old*, 2 Barn. & C. 634; *Hakes v. Hotchkiss*, 23 Vt. 231; *Fitch v. Woodruff & B. Iron Works*, 29 Conn. 82; *Carter v. Hamilton*, 11 Barb. 147; *Davis v. Talcott*, 14 Barb. 621; *Barringer v. Sneed*, 3 Stew. 201, 20 Am. Dec. 74; *Thompson v. Sloan*, 23 Wend. 71, 35 Am. Dec. 546.

General expressions in an obligation cannot be restrained by parol proof of the understanding of the parties. *Kelly v. Bradford*, 3 Bibb, 317, 6 Am. Dec. 656.

A contract consummated by writing is presumed to contain the whole agreement. *Reed v. Van Ostrand*, 1 Wend. 424, 19 Am. Dec. 529; *Silliman v. Tuttle*, 45 Barb. 175; *Filkins v. Whyland*, 24 N. Y. 343.

Where anything forming part of the contract is left out of the writing by fraud or accident, parol evidence may be received to prove these facts. *Smith v. Williams*, 1 Murph. 426, 4 Am. Dec. 564.

Parol evidence is not admissible to show that a written contract does not agree with the previous agreement of the parties. *La Farge v. Rickert*, 5 Wend. 187, 21 Am. Dec. 209.

A written contract, clear in itself, cannot be varied by parol; the contract evidence is the best evidence of the intent of the parties. *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208.

No promise will be implied where there is an express contract covering the whole subject matter. *Phelps v. Sheldon*, 13 Pick. 50, 23 Am. Dec. 659; *Waite v. Merrill*, 4 Me. 102, 16 Am. Dec. 238; *Stockett v. Watkins*, 2 Gill & J. 326, 20 Am. Dec. 438.

Words inserted in a contract, and then erased, may be referred to, to ascertain the intent of the parties. *Hobart v. Dodge*, 10 Me. 156, 25 Am. Dec. 214.

Parol evidence of an agreement which has been reduced to writing is inadmissible. *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657.

All verbal contracts made by a grantor at or before execution of deed, are merged in the conveyance and the covenants therein. *Hunt v. Amidon*, 4 Hill, 345, 40 Am. Dec. 283; *Grice v. Scarborough*, 2 Speers, L. 649, 42 Am. Dec. 391.

Evidence of a contemporaneous agreement to revoke written

instruments is inadmissible. *Wemple v. Knopf*, 15 Minn. 440, 2 Am. Rep. 147.

Evidence is admissible to show that a note was to be paid in Confederate money. *Donley v. Tindall*, 32 Tex. 43, 5 Am. Rep. 234.

When an oral contract was made which included a warranty, and the agreement was reduced to writing, not including the warranty, evidence of the warranty was admitted. *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512.

The rule as to parol evidence does not apply where the contract was verbal and entire, and only a part was reduced to writing; nor does it apply to collateral undertakings. *Potter v. Hopkins*, 25 Wend. 417; *Batterman v. Pierce*, 3 Hill, 171; *Grierson v. Mason*, 6 N. Y. 394; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Filkins v. Whyland*, 24 N. Y. 344; *Jeffery v. Walton*, 1 Stark. 267; *Morgan v. Griffith*, L. R. 6 Exch. 70; *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Johnson v. Oppenheim*, 55 N. Y. 280; *Angell v. Duke*, L. R. 10 Q. B. 174; *Mann v. Nunn*, 43 L. J. C. P. 241.

Previous negotiations and the usage of the business are admitted to explain ambiguous terms. A stipulation on a point which the writing either expressly or impliedly controls, cannot be added by parol. *Thorp v. Ross*, 4 Abb. App. Dec. 416; *Zerrahn v. Ditson*, 117 Mass. 553; *Stoops v. Smith*, 100 Mass. 63, 1 Am. Rep. 85; *Myers v. Sarl*, 1 El. & El. 306; *Sweet v. Lee*, 3 Man. & G. 452; *Porter v. Spence*, 38 N. Y. 119.

§ 164. **Principle as to Deeds.**—When a deed absolute on its face may be shown to be a mortgage, the proposition indicated by the caption has become a well recognized principle, both in this country and in England, that parol evidence is always competent to establish, without preliminary proof, the fact that the conveyance was obtained through fraud or mistake. It may be added that a contemporaneous agreement to reconvey will furnish strong indicia of the fact that the deed, although executed with every solemnity imposed by law, is in truth designed as between the parties to have the effect of a mortgage only. *Lewis v. Small*, 71 Me. 552; *Barthell v. Syverson*, 54 Iowa, 160; *Sims v. Gaines*, 64 Ala. 392; *Brush v. Peterson*, 54 Iowa, 243; *Hill v. Edwards*, 11 Minn. 22; *Honore v. Hutchings*, 8 Bush, 687; *Archambau v. Green*, 21 Minn. 520; *Benton v. Nicoll*, 24 Minn. 221; *Edrington v. Harper*, 3 J. J. Marsh. 353; *Mason v. Hearne*, 1 Busb. Eq.

88; *Shaw v. Erskine*, 43 Me. 371; *Enos v. Sutherland*, 11 Mich. 538; *Marshall v. Stewart*, 17 Ohio, 356; *Reynolds v. Scott*, Brayton, 75; *Clark v. Lyon*, 46 Ga. 202; *Walker v. Tiffin G. & S. Min. Co.* 2 Colo. 89; *Robinson v. Willoughby*, 65 N. C. 520; *Ogden v. Grant*, 6 Dana, 473; *Watkins v. Gregory*, 6 Blackf. 113; *Ewart v. Walling*, 42 Ill. 453; *Crassen v. Swoveland*, 22 Ind. 427; *Harbison v. Lemon*, 3 Blackf. 56; *Plato v. Roe*, 14 Wis. 453; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Knowlton v. Walker*, 13 Wis. 264; *Brinkman v. Jones*, 44 Wis. 498; *Sharkey v. Sharkey*, 47 Mo. 543; *Copeland v. Yoakum*, 38 Mo. 349; *Preschbaker v. Feaman*, 32 Ill. 475; *Warren v. Lovis*, 53 Me. 463; *Mills v. Darling*, 43 Me. 565; *Clement v. Bennett*, 70 Me. 207; *Umbenhower v. Miller*, 101 Pa. 71; *Decker v. Leonard*, 6 Lans. 264; *Bayley v. Bailey*, 5 Gray, 505; *Blaney v. Bearce*, 2 Me. 132; *Nicolls v. McDonald*, 101 Pa. 514; *Van Dusen v. Morrell*, 3 Keyes, 311; *Judd v. Flint*, 4 Gray, 557; *Lane v. Shears*, 1 Wend. 433; *Brown v. Dean*, 3 Wend. 208; *Weed v. Stevenson*, Clarke, Ch. 166, 7 L. ed. 82; *Lanahan v. Sears*, 102 U. S. 318, 26 L. ed. 180; *Dow v. Chamberlin*, 5 McLean, 281; *Baxter v. Dear*, 24 Tex. 17, 71 Am. Dec. 89; *Hammonds v. Hopkins*, 3 Yerg. 525; *Caruthers v. Hunt*, 18 Iowa, 576; *Freeman v. Baldwin*, 13 Ala. 246; *Sims v. Gaines*, 64 Ala. 392; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Manufacturers' & M. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335; *Guthrie v. Kahle*, 46 Pa. 331; *Jaques v. Weeks*, 7 Watts, 261; *Houser v. Lamont*, 55 Pa. 311; *Kerr v. Gilmore*, 6 Watts, 405; *Colwell v. Woods*, 3 Watts, 188, 27 Am. Dec. 345; *Stoever v. Stoever*, 9 Serg. & R. 434; *Peterson v. Clark*, 15 Johns. 205; *Henry v. Davis*, 7 Johns. Ch. 40, 2 L. ed. 213; *Bowery Nat. Bank v. Duncan*, 12 Hun, 405; *Hodges v. Tennessee M. & F. Ins. Co.* 8 N. Y. 416; 1 Powell, Mortgages, 284; *Conway v. Alexander*, 11 U. S. 7 Cranch, 241, 3 L. ed. 329; *Vernon v. Butler*, 2 Eden, 110; *Oldham v. Hulley*, 2 J. J. Marsh. 114.

§ 165. **Gross Inadequacy of Consideration.**—A pertinent remark in this connection is to the effect that parol evidence showing gross inadequacy of consideration is always admissible as tending to show that an absolute sale was not within the contemplation of the parties. *Conway v. Alexander*, 11 U. S. 7 Cranch, 240, 3 L. ed. 329; *Wharf v. Howell*, 5 Binn. 503; *Livingston v. Bell*, 3 Watts, 198; *Oldham v. Hulley*, 2 J. J. Marsh. 114; *Spurgeon v. Collier*, 1 Eden, 58; *Wentworth v. Tubb*, 11 N. Y. Leg. Obs. 282;

*Sevier v. Greenway*, 19 Ves. Jr. 413; *Powell, Mortgages*, 138, note 1; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Webb v. Paterson*, 7 Humph. 435. The tendency of the court is to preserve rights of redemption. 2 Greenl. Cruise, title 15, chap. 1, § 38, note, citing *Skinner v. Miller*, 5 Litt. 84; *Secrest v. Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Crane v. Bounell*, 2 N. J. Eq. 264. See also *Eaton v. Green*, 22 Pick. 530; *Holmes v. Grant*, 8 Paige, 259, 261, 4 L. ed. 421 (the note in later editions); 1 Kent, Com. marg. p. 144; *Flagg v. Mann*, 2 Sumn. 540, are to the same effect.

The early distinction imposed upon courts of law by which they were obliged to rule against the principle here contended for has entirely disappeared, and under the influence and stimulus of the reformed procedure by which courts exercise concurrent jurisdiction both at law and in equity, an instrument absolute on its face as a conveyance may be shown to be a mortgage. *Hodges v. Tennessee M. & F. Ins. Co.* 8 N. Y. 416.

It was early recognized by the Supreme Court of Massachusetts as an equitable doctrine that parol evidence is admissible for such a purpose. *Richards v. Allen*, 8 Pick. 406; *Taylor v. Luther*, 2 Sumn. 228. See also *Strong v. Stewart*, 4 Johns. Ch. 167, 1 L. ed. 802; *Clark v. Henry*, 2 Cow. 332; *Whittick v. Kane*, 1 Paige, 206, 2 L. ed. 618; *Van Buren v. Olmsted*, 5 Paige, 10, 3 L. ed. 606; *McIntyre v. Humphreys*, Hoffm. Ch. 34, 6 L. ed. 1054.

A deed absolute on its face given to secure the payment of a promissory note is a mortgage. *Raynor v. Drew*, 72 Cal. 307. Compare *Warden v. Enslen*, 73 Cal. 291; *Helm v. Boyd*, 13 West. Rep. 879, 124 Ill. 370. A deed absolute on its face may be shown to be defeasible by parol upon adequate proof. *McMillan v. Bissell*, 63 Mich. 66.

The proof to establish that a deed absolute on its face is to be treated as a mortgage should be clear and satisfactory. *Langer v. Meservey*, 80 Iowa, 158.

A deed absolute in form will be construed to be in effect a mortgage only upon clear unequivocal and convincing proof. *Armour v. Spalding*, 15 Colo. 302.

To show that a deed purporting to be absolute is merely a security for a debt, evidence must be clear, explicit and unequivocal. *Jones v. Pierce*, 134 Pa. 533.

§ 166. **Review of Authority.**—To constitute a mortgage

for the payment of money there must be a subsisting debt therefor, showing the relation of debtor and creditor, and this continuing liability may be express or implied; hence there need be no bond, note or any other independent personal security therefor. Cited in *Reed v. Reed*, 75 Me. 272; 3 Pom. Eq. Jur. 174. Examined in *Swetland v. Swetland*, 3 Mich. 488. See *Smith v. People's Bank*, 24 Me. 185; *Mitchell v. Burnham*, 44 Me. 286; *Henry v. Davis*, 7 Johns. Ch. 40, 2 L. ed. 213; *Brookings v. White*, 49 Me. 483; *Varney v. Hawes*, 68 Me. 442. If the deed and bond were contained in a single paper, there can be no doubt it would be a mortgage, differing but little in form from the usual mortgage deed. The fact that they are on separate papers does not in equity change the nature of the transaction; they are to be read together, and the bond must be regarded as a defeasance to the deed. Cited in *Hill v. Edwards*, 11 Minn. 28. See *Holbrook v. Finney*, 4 Mass. 466; *Kerr v. Gilmore*, 6 Watts, 406; *Kelly v. Thompson*, 7 Watts, 403; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Harbison v. Lemon*, 3 Blackf. 56. The evidence must make it appear from the instrument or otherwise that the transaction was originally intended as security for money, that it was in fact a mere loan of money. Cited in *Saxton v. Hitchcock*, 47 Barb. 225. See *Brown v. Dewey*, 2 Barb. 28; *Robinson v. Cropsey*, 6 Paige, 480, 3 L. ed. 1069; *Brown v. Dean*, 3 Wend. 208. A deed absolute on its face may in equity be shown by parol or other extrinsic evidence to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument is not an essential element in an action for relief and to give effect to the intention of the parties. Cited in *Horn v. Keteltas*, 46 N. Y. 610, 42 How. Pr. 152. If the remedies of grantor and grantee are reciprocal,—the former bound to pay the money, the latter to reconvey the premises,—the deed will be construed a mortgage. Cited in *Swetland v. Swetland*, 3 Mich. 488.

Sale made with agreement to repurchase. Where land is conveyed by an absolute deed, and an instrument is given back as a part of the same transaction, not containing the condition ordinarily inserted in mortgages, but an agreement to reconvey if the grantor shall pay a certain sum at or before a specified time, the two instruments taken together may be a mere sale with a contract of repurchase, or they may constitute a mortgage. If the transaction is merely a sale and contract of repurchase the agree-

ment must be fulfilled according to its terms; and if vendor fails, there is no equity of redemption. See *Haynie v. Robertson*, 58 Ala. 37; *Pearson v. Seay*, 38 Ala. 643; *McKinstry v. Conly*, 12 Ala. 678; *Johnson v. Clark*, 5 Ark. 340; *Farmer v. Grose*, 42 Cal. 169; *Page v. Vilhac*, 42 Cal. 75; *Henley v. Hotaling*, 41 Cal. 22; *Conway v. Alexander*, 11 U. S. 7 Cranch, 218, 3 L. ed. 321; *Price v. Karnes*, 59 Ill. 276; *Hanford v. Blessing*, 80 Ill. 188; *Carr v. Rising*, 62 Ill. 14; *Pitts v. Cable*, 44 Ill. 103; *Wilson v. Carpenter*, 62 Ind. 495; *McNamara v. Culver*, 22 Kan. 661; *French v. Sturdivant*, 8 Me. 246; *Rich v. Doane*, 35 Vt. 125; *Macaulay v. Porter*, 71 N. Y. 173; *Morrison v. Brand*, 5 Daly, 40; *Brown v. Devey*, 2 Barb. 28; *Merritt v. Brown*, 19 N. J. Eq. 286; *Haines v. Thomson*, 70 Pa. 434; *Ransone v. Frayser*, 10 Leigh, 592; *Moss v. Green*, 10 Leigh, 251; *Kelly v. Bryan*, 6 Ired. Eq. 283; *M'Laurin v. Wright*, 2 Ired. Eq. 94; *Turner v. Kerr*, 44 Mo. 429; *Holmes v. Fresh*, 9 Mo. 200; *Cornell v. Hall*, 22 Mich. 377; *Slutz v. Desenberg*, 28 Ohio St. 371; *Lane v. Dickerson*, 10 Yerg. 373; *Smith v. Crosby*, 47 Wis. 160; *Barrell v. Sabine*, 1 Vern. 268; *Davis v. Thomas*, 1 Russ. & M. 506; *Williams v. Owen*, 5 Myl. & C. 303; *Perry v. Meddlowcroft*, 4 Beav. 197; *Alderson v. White*, 2 DeG. & J. 97. Cited in 3 Pom. Eq. Jur. 171.

§ 167. **Deed Construed to be a Mortgage when Design was Merely to Secure Loan.**—An absolute deed will be valid and effectual as a mortgage, if it clearly appear that it was designed as a security for money; and this may be shown to be the intention and effect of the deed by a contemporaneous or subsequent writing, or by an agreement resting in parol. *Littlewort v. Davis*, 50 Miss. 403; *Weide v. Gehl*, 23 Minn. 449; *O'Neill v. Capell*, 62 Mo. 202; *Judge v. Reese*, 24 N. J. Eq. 387; *Mechan v. Forrester*, 52 N. Y. 277; *Church v. Cole*, 36 Ind. 34; *Stinruck's App.* 70 Pa. 289; *French v. Burns*, 35 Conn. 359. But only on purely equitable grounds will such a deed be declared to be a mortgage. (*Hassam v. Barrett*, 115 Mass. 256); and clear proof is required before a court of equity will treat it as such. *Price v. Karnes*, 59 Ill. 276; *Henley v. Hotaling*, 41 Cal. 22; *Kent v. Lasley*, 24 Wis. 654; *Phillips v. Croft*, 42 Ala. 477. Whether such deed is a mortgage is a mixed question of law and fact. *Brown v. Clifford*, 7 Lans. 46; *Baisch v. Oakley*, 68 Pa. 92. And the burden of proof to show that it is a mortgage is upon the grantor. *Haines v. Thomson*, 70 Pa. 434.

The fact once established by the terms of the conveyance, or by other evidence that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees; and the conveyance remains but a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor or those claiming under him until after foreclosure. *Murray v. Walker*, 31 N. Y. 399; *DeCamp v. Crane*, 19 N. J. Eq. 166; *Holliday v. Arthur*, 25 Iowa, 19. It is not material that the conveyance should be made by the debtor, or by him to whom the equity of redemption will exist. It is sufficient if the debtor and he who claims to occupy the position of mortgagor with the right of redemption has an interest legal or equitable in the premises, and the grantee of the legal title has, and acquired such title by the act and assent of the debtor, and as a security for his debt. *Carr v. Carr*, 52 N. Y. 251, 4 Lans. 314. See *Farmer v. Grose*, 42 Cal. 169; *Moore v. Wade*, 8 Kan. 380; *Crane v. DeCamp*, 21 N. J. Eq. 414; *Klinck v. Price*, 4 W. Va. 4; *Robinson v. Willoughby*, 65 N. C. 520.

§ 168. **Admissible to Show Real Party in Interest.**—The principle is well settled that if an agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself as agent or not, or whether his principal be known or unknown, his principal may be made liable and will be entitled to sue thereon in all cases, and the instrument may be resorted to for the purpose of ascertaining the terms of the agreement. *Nicoll v. Burke*, 78 N. Y. 580. See *Hill v. Miller*, 76 N. Y. 32; *Merchants Bank v. Griswold*, 72 N. Y. 472. This doctrine applies as well to contracts which are required to be in writing as to those where a writing is not essential to their validity; and parol evidence may be introduced to charge the principal, where it would be inadmissible to discharge the agent. *Ford v. Williams*, 62 U. S. 21 How. 287, 16 L. ed. 36; *Coleman v. Elmira First Nat. Bank*, 53 N. Y. 388, 393; *Briggs v. Partridge*, 64 N. Y. 357, 362; *Higgins v. Senior*, 8 Mees. & W. 384; *Trueman v. Loder*, 11 Ad. & L. 594; *Dykers v. Townsend*, 24 N. Y. 57, 61; *Huntington v. Knox*, 7 Cush. 371; *Calder v. Dobell*, L. R. 6 C. P. 486. A different rule prevails as to sealed instruments. But there are cases which hold that when a sealed instrument has been executed

by an agent in his own name for an undisclosed principal, the contract in law is the contract of the agent and not that of the principal. But if the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts *in pais*, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the agreement, which may be resorted to to ascertain the terms of the agreement. *Randall v. Van Vechten*, 19 Johns. 60; *Dubois v. Delaware & H. Canal Co.* 6 Wend. 285; *Lawrence v. Taylor*, 5 Hill, 107. See *Hensler v. Sefrin*, 19 Hun, 564.

The Federal courts are equally pronounced in support of the same doctrine; where a party has entered into a written contract, it may be shown, to charge another as principal, that the former did it as agent, although the agency was concealed and the principal not disclosed. *Jones v. New York Guaranty & I. Co.* 101 U. S. 622, 25 L. ed. 1030. But the agent who binds himself will not be allowed to contradict the writing by proving that he was contracting only as agent. *Nash v. Towne*, 72 U. S. 5 Wall. 689, 18 L. ed. 527. Where a deed designates the grantee as "trustee" without setting out for whom and for what purpose he is trustee. *Union Pac. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391. This principle receives further elaboration in the subdivision following.

### § 169. In its Relations to Negotiable Paper.

a. **Recent Authorities Examined.**—It is a general and probably an invariable rule of commercial paper, that no one can be held liable on a bill of exchange or promissory note, whose name does not appear in some way upon the paper; and in the application of this rule to the instruments executed by an agent, it is generally held that the real principal cannot be charged in suits upon negotiable instruments unless his name is disclosed in some part of the instruments. *Stackpole v. Arnold*, 11 Mass. 27; *Slawson v. Loring*, 5 Allen, 340; *Williams v. Robbins*, 16 Gray, 77; *Arnold v. Sprague*, 34 Vt. 409; *Pease v. Pease*, 35 Conn. 131; *Pentz v. Stanton*, 10 Wend. 271; *Hyde v. Paige*, 9 Barb. 150; *Kenyon v. Williams*, 19 Ind. 45; *Thurston v. Mauro*, 1 G. Greene, 231; *Heaton v. Myers*, 4 Colo. 62; *De Witt v. Walton*, 9 N. Y. 571. In 1 Daniel on Negotiable Instruments, § 717, the



author says: "But when it appears from an inspection of the paper that the party is an indorser, there seems to be no just ground for the distinction taken between the implied contracts arising from his mere name thereon written, and contracts written out *in extenso*. The indorsement seldom consists of anything more than the indorser's signature; but if the agreement imported by that signature were written over it in full the undertaking of the indorser would not be more clearly defined than it is by the signature itself. Its presence and position upon the instrument are as plain a manifestation of the intention of the party as if it were set forth in express words, and parol evidence should not be admitted to vary or contradict it."

The case of *Dale v. Gear*, 38 Conn. 15, is a very strong case, in point, in which the court in reply to the claim that as between the indorser and indorsee parol testimony was inadmissible, uses this language: "But the answer must be that the contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irrespective of any contingency of negotiation, as if written out in full when indorsed." In that case as well as in Daniel's treatise, some three or four limitations or exceptions are noticed, as where the indorsement was without consideration—or upon trust for some special purpose, as for collection merely—or where there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and where the attempt to enforce it would be fraud. *Doolittle v. Ferry*, 20 Kan. 230. Parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement without recourse. *Ibid.* *Pearson v. Stoddard*, 9 Gray, 199; *Rivers v. Thomas*, 1 Lea, 649; *Clapp v. Rice*, 13 Gray, 403; *Cady v. Shepard*, 12 Wis. 639; *Baker v. Scott*, 5 Rich. L. 305; *Fegenbush v. Lang*, 28 Pa. 193; *Boynnton v. Pierce*, 79 Ill. 145; *Sill v. Leslie*, 16 Ind. 236; *Kealing v. Vansickle*, 74 Ind. 529; *Sturtevant v. Randall*, 53 Me. 149; *Jennings v. Thomas*, 13 Smedes & M. 617.

It is also competent to show by parol evidence the character of the indorsement, whether it was made after maturity; (*McCelvey v. Noble*, 12 Rich. L. 167, or before the indorsement without recourse to the payee (*Watkins v. Kirkpatrick*, 26 N. J. L. 84),

or whether the instrument was negotiable or not (*Wells v. Jackson*, 6 Blackf. 40).

The admissibility of parol evidence may be justified on the ground that the position of the signature on the back is ambiguous in itself, and the contract not being fully expressed in the mere signature may be explained and proved by parol evidence, when the payee or indorsee writes his name across the back of the paper, there is no ambiguity concerning the character and meaning of the signature, to be explained away. But if any one alone writes his name thereon, he only becomes a party to the instrument by his signature, and the position of the signature does not clearly indicate the character in which he signed, it can therefore be shown by parol evidence. Daniel, Neg. Inst. § 711. But see *Essex Co. v. Edmands*, 12 Gray, 273; *Kellogg v. Dunn*, 2 Met. (Ky.) 215; *Heath v. Van Cott*, 9 Wis. 516; *Peckham v. Gilman*, 7 Minn. 446.

For the reason that parol evidence is admissible only to explain away the ambiguities of a written instrument, as soon as the ambiguity is disposed of or dissipated, parol evidence ceases to be admissible to control the terms and character of the contract; thus it has been held that proof of the fact that the indorsement was made before the delivery of the paper to the payee, fixes the liability of the irregular indorser as that of joint maker, and parol evidence is inadmissible to show a different intention. *Way v. Butterworth*, 108 Mass. 512. Other cases hold that the indorsement before the payee only excludes the liability of an indorsee and it may be shown by parol evidence whether the party so signing intended to be bound as a joint promisor or as a guarantor. *Greenough v. Smead*, 3 Ohio St. 415; *Quin v. Sterne*, 26 Ga. 223; *Brinkley v. Boyd*, 9 Heisk. 149; but see *contra*, *Price v. Lavender*, 38 Ala. 390; *Kamm v. Holland*, 2 Or. 59; *Vore v. Hurst*, 13 Ind. 554; *Sill v. Leslie*, 16 Ind. 236; *Roberts v. Masters*, 40 Ind. 462. Finally, if the party in writing his name on the back of a commercial instrument expressly designates the character of his signature such as indorser, guarantor and the like parol evidence is inadmissible for any purpose, since the express description removes the ambiguity and leaves nothing to explain. *Tinker v. McCauley*, 3 Mich. 188; *Whitehouse v. Hanson*, 42 N. H. 9; *Callaway v. Harrold*, 61 Ga. 111.

The rule discussed in the foregoing paragraph was not established without a struggle, and has not at all times, and in all

states prevailed without exception, and perhaps is not even now universally accepted. Many early cases in New York were decided under the influence of the former practice and the ancient notions; and although the Court of Appeals has completely repudiated the doctrine of those adjudications, yet the principles announced by it have not always followed by the inferior tribunals of the same State.

Whatever difficulty the courts have in determining what is the proper presumption in respect to irregular indorsement, they are practically unanimous in holding that, as between the immediate parties, it is competent to show by parol evidence in what character the irregular indorser intended that he should be bound, and proof of this intention would countervail the prima facie presumption set up by the court. *Good v. Martin*, 95 U. S. 95, 24 L. ed. 343; *Rey v. Simpson*, 63 U. S. 22 How. 341, 16 L. ed. 260; *Chaddock v. Vanness*, 35 N. J. L. 517; *Riley v. Gerrish*, 9 Cush. 104; *Johnson v. Ramsey*, 43 N. J. L. 279; *Sylvester v. Downer*, 20 Vt. 355; *Quin v. Sterne*, 26 Ga. 224; *Ives v. Bosley*, 35 Md. 262; *Owings v. Baker*, 54 Md. 82; *Cahn v. Dutton*, 60 Mo. 297; *Nurre v. Chittenden*, 56 Ind. 465; *Baker v. Scott*, 5 Rich. L. 305; *Faulkner v. Faulkner*, 73 Mo. 327; *Comparree v. Brockway*, 11 Humph. 358; *Perkins v. Catlin*, 11 Conn. 213; *Pierse v. Irvine*, 1 Minn. 369; *Jennings v. Thomas*, 13 Smedes & M. 617; *Strong v. Riker*, 16 Vt. 554; *Iser v. Cohen*, 1 Baxt. 421.

Abundant authority can be shown that an indorser intending to be bound as a guarantor only, can show that relation or character to the paper by parol. *Worden v. Salter*, 90 Ill. 60; *Seymore v. Farrell*, 51 Mo. 95; *Browning v. Merritt*, 61 Ind. 425; *Eilbert v. Finkbeiner*, 68 Pa. 243. So too he must show the relation was intended to be that of a maker, (*Lincon v. Hinzey*, 51 Ill. 436), or a surety or joint maker (*Rey v. Simpson*, 63 U. S. 22 How. 34, 16 L. ed. 260; *Walz v. Alback*, 37 Md. 404; *Kealing v. Vansickle*, 74 Ind. 529; *Baker v. Robinson*, 63 N. C. 191), also as an indorsee, first or second. *Mammon v. Hartman*, 51 Mo. 169; *Kuntz v. Tempel*, 48 Mo. 71; *Eberhart v. Page*, 89 Ill. 550; *Cady v. Shephard*, 12 Wis. 639; *Seymour v. Micey*, 15 Ohio St. 515; *Kellogg v. Dunn*, 2 Met. (Ky.) 215.

Parol evidence is held to be admissible, even where the indorsement was written below the signature of the payee (*Brown v. Butler*, 99 Mass. 179); and whenever parol evidence is admis-

sible, it is competent to show by it that the party signed before the delivery of the paper to the payee, and that he intended to guarantee its payment to the payee.

**b. Modifications of the General Rule as to Negotiable Paper.**—While it is the general rule that parol evidence is inadmissible to explain away or vary a commercial instrument, there are a few exceptions to the rule. The exceptions are, principally, of three classes. First, it is always competent to show by parol evidence that the instrument was made for the accommodation of the indorsee. *Breneman v. Furniss*, 90 Pa. 186; *Hamburger v. Miller*, 48 Md. 325; *Morris v. Faurot*, 21 Ohio St. 155; *Cole v. Smith*, 29 La. Ann. 551; *Davis v. Morgan*, 64 N. C. 570; *Lovejoy v. Citizens Bank*, 23 Kan. 331; *Kirkham v. Boston*, 67 Ill. 599; *McCoon v. Biggs*, 2 Hill, 121; *Denniston v. Bacon*, 10 Johns. 198.

Subsequent failure of consideration may be shown by parol evidence, as well as by an original want of consideration. *Smith v. Carter*, 25 Wis. 283. So can partial failure or want of consideration be proved by parol evidence. *Cook v. Cockril*, 1 Stew. (Ala.) 475. It can also be shown that the consideration was certain payments to be made by the indorsee the liability on the indorsement being conditioned upon making these payments. *Scammon v. Adams*, 11 Ill. 575; *Wood v. Matthews*, 73 Mo. 477.

It may be shown that the indorsement was made in trust to the indorsee for the purpose of carrying out some purpose of the indorser, as his agent, or as a trustee. Thus, for example, it can be shown that the indorsement was made for collection only. *Martin v. Cole*, 3 Colo. 114; *Lewis v. Dunlap*, 72 Mo. 178; *Hamburger v. Miller*, *supra*; *Smith v. Childress*, 27 Ark. 328; *Downer v. Chesebrough*, 36 Conn. 39.

The indorsement may be shown to be an escrow on an express condition not yet performed (*Chaddock v. Vunness*, 35 N. J. L. 520); or to enable a transfer for any other special purpose. *Patterson v. Todd*, 18 Pa. 426; *Patten v. Pearson*, 57 Me. 428; *Lynch v. Goldsmith*, 64 Ga. 42; *Hardy v. White*, 60 Ga. 454.

Parol evidence is not admissible to show this fact in a suit by a bona fide holder (*Lewis v. Dunlap*, 72 Mo. 174; *Stapler v. Burns*, 43 Ga. 382; *Meador v. Dollar Sav. Bank*, 56 Ga. 605); but it is not possible, on the other hand, to show by parol evidence that an indorsement, expressed to be "for collection," was

intended to pass title. *White v. Miners Nat. Bank*, 102 U. S. 658, 26 L. ed. 250; *Leary v. Blanchard*, 48 Me. 269; *First Nat. Bank of Canton v. McCann*, 4 Ill. App. 250; *Armour Bros. Bkg. Co. v. Riley Co. Bank*, 30 Kan. 163; *Rock Co. Nat. Bank of Janesville v. Hollister*, 21 Minn. 385; *Third Nat. Bank of Syracuse v. Clark*, 23 Minn. 263.

§ 170. **Parol Evidence in Relation to Ambiguities.**—Parol evidence is also admissible as an aid in the construction of a written instrument where some ambiguity is disclosed on the face of the instrument and those which arise in the application of an instrument of clear and definite meaning to doubtful subject matter. An ambiguity apparent on reading an instrument is termed *ambiguitas patens* or a patent ambiguity; that which arises merely upon its application, *ambiguitas latens* or a latent ambiguity. The general rule is that the latter species of ambiguity may be removed by means of parol evidence (*Cole v. Wendel*, 8 Johns. 115; *Jackson v. Britton*, 4 Wend. 507; *Galen v. Brown*, 22 N. Y. 37); while on the other hand such evidence is not admissible to explain an ambiguity apparent on the face of an instrument. *Blossburg & C. R. Co. v. Tioga R. Co.* 1 Keyes, 486; *Panton v. Tefft*, 22 Ill. 366; *McNair v. Toler*, 5 Minn. 435. In defining these respective terms, Bouvier adopts the following language: "Latent ambiguity is that which arises from some collateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible, while patent ambiguity is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction upon it, placing itself in the situation of the parties, cannot ascertain therefrom the parties' intentions." See Greenl. Ev. §§ 292, 300.

a. **Patent Ambiguity Defined.**—A patent ambiguity is one which arises from the writer's own incapacity, either of perception or explanation, and exhibits itself upon the face of the writing. His meaning in a particular relation he failed to exhibit, and the writing shows the failure. See Wharton, Ev. § 956.

Patent ambiguities cannot be explained by parol. See *Fish v. Hubbard*, 21 Wend. 651; *McNair v. Toler*, 5 Minn. 435; *Campbell v. Johnson*, 44 Mo. 247.

So parol evidence of boundaries and locations may be received to explain ambiguous terms. *Deery v. Cray*, 77 U. S. 10 Wall.

263, 19 L. ed. 887; *Dunham v. Gannett*, 124 Mass. 151; *Hoar v. Goulding*, 116 Mass. 132; *Bybee v. Hageman*, 66 Ill. 519; *Beal v. Blair*, 33 Iowa, 318; *Maguire v. Baker*, 57 Ga. 109; *Kimball v. Brawner*, 47 Mo. 398; *O'Farrell v. Harney*, 51 Cal. 125.

**b. Latent Ambiguity Defined.**—A latent ambiguity created by parol proof is open to explanation, and this in no sense infringes upon the rule that a written contract cannot be altered by parol, but that such writing is to be deemed to express the intent of the parties; where such an ambiguity is created by the parol evidence in the case it may be explained by any evidence, written or unwritten, within reach of the parties. *Galen v. Brown*, 22 N. Y. 37.

A latent ambiguity is made out, not only where there is a legal name which fits several, but equally where there is a description only (*Brewster v. McCall*, 15 Conn. 292; *Button v. American Tract Soc.* 23 Vt. 350); or a name used in common parlance (*Ayres v. Weed*, 16 Conn. 300); or a name which fits one claimant only, coupled with a description which fits the other only (*Drake v. Drake*, 8 H. L. Cas. 178); or a designation which without rejection of some terms is false in application. See *Still v. Hoste*, 6 Madd. 192, well explained in 1 Redf. on Wills, 627, n. *Abbott, Trial Ev.* 140.

### § 171. Parol Evidence in Relation to Custom and Usage.

**a. Evidence of Custom and Usage to Contravene Rule of Law.**—Custom and usage cannot be given in evidence to contravene a rule of law or to alter or contradict the express or implied terms of a contract free from ambiguity. *Hopper v. Sage*, 112 N. Y. 530; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444; *Brown v. Foster*, 113 Mass. 136; *Randall v. Smith*, 63 Me. 103; *Raisin v. Clark*, 41 Md. 158; *Shaw v. Spencer*, 100 Mass. 382; *Rogers v. Woodruff*, 23 Ohio St. 632; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299; *Baker v. Drake*, 66 N. Y. 518; *Southwestern F. & C. P. Co. v. Stanard*, 44 Mo. 71; *Bodfish v. Fox*, 23 Me. 90; *Cortel-you v. Van Brundt*, 2 Johns. 357; *Gano v. Palo Pinto Co.* 71 Tex. 99.

**b. When Admissible.**—But evidence of custom and usage may be admissible to explain the terms of a written instrument, to make certain technical expressions used in a contract, or to ascertain the intention of parties entering into an agreement in writing, especially when such custom or usage is peculiar to some particu-

lar business. *Collender v. Dinsmore*, 55 N. Y. 200; *Walls v. Bailey*, 49 N. Y. 464; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374; *Morningstar v. Cunningham*, 9 West. Rep. 59, 110 Ind. 328; *Mooney v. Howard Ins. Co.* 138 Mass. 375; *Barlow v. Lambert*, 28 Ala. 704; *Southwestern F. & C. P. Co. v. Stanard*, 44 Mo. 71; *Johnson v. Concord R. Corp.* 46 N. H. 213; *Cooper v. Kane*, 19 Wend. 386; *Avery v. Stewart*, 2 Conn. 69.

For the general law upon the subject, see Lawson, Usages and Customs, chap. 4, 5, with the cases therein discussed and cited.

In *Frith v. Barker*, 2 Johns. 327, Kent, *Ch. J.*, says: "Usage never is, nor ought to be received to contradict a settled rule of commercial law."

In *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987, it is said: "If, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made."

In *Woodruff v. Merchants Bank*, 25 Wend. 673, a usage in the city of New York that days of grace were not allowed on a bill of exchange was held illegal. Nelson, *J.*, saying, "if sanctioned, its effect would be to overturn the whole law on the subject of bills of exchange in the city of New York, and it could not be allowed to control the settled and acknowledged law of the State in respect to this description of paper."

So in *Barton v. McKelway*, 22 N. J. L. 165, in a contract to deliver certain trees from a nursery, they were to be not less than one foot high. The dispute was as to the measurement; the evidence was held competent of a usage in that trade to measure only to the top of the ripe, hard wood, and not to the tip of the tree. See also *Wilcox v. Wood*, 9 Wend. 346; *Grant v. Maddox*, 15 Mees. & W. 737.

Evidence of custom or usage is admissible to explain the meaning and intent of the parties to a contract which could not be explained without the aid of this extrinsic evidence. *Wigglesworth v. Dallison*, Smith's Lead. Cas. (7 Am. ed.) 900; *Collyer v. Collins*, 17 Abb. Pr. 467; *Spear v. Hart*, 3 Robt. 420; *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987; *Robinson v. United States*, 80 U. S. 13 Wall. 363, 20 L. ed. 653; *Walls v. Bailey*, 49 N. Y. 464; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74.

**c. When Resorted to as a Means of Determining the Intent.**—Custom and usage is resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987; *Bradley v. Wheeler*, 44 N. Y. 495; *Wheeler v. Newbould*, 16 N. Y. 392; *Walls v. Bailey*, 49 N. Y. 464. In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. *Hutton v. Warren*, 1 Mees. & W. 466; *Wigglesworth v. Dallison*, 1 Dougl. 201. But the incident sought to be imported into the contract must not be inconsistent with its express terms or any necessary implication from those terms (*Note to Wigglesworth v. Dallison*, Smith's Lead. Cas. [6 Am. ed.], 677, and cases cited). Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract (*Allen v. Dykers*, 3 Hill, 593; *Hinton v. Locke*, 5 Hill, 437; *Magee v. Atkinson*, 2 Mees. & W. 442; *Adams v. Wordley*, 1 Mees. & W. 374, and other cases cited; 1 Smith's Lead. Cas., page 680, *et seq.*).

**d. Rule Admitting Always Taken with Qualifications.**—The rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never be allowed to vary or contradict the written instrument, either expressly or by implication. See Best, Ev. Morgan's notes, § 228; 2 Phill. Ev. 10 ed. 417; *Cranwell v. The Fanny Fosdick*, 15 La. Ann. 436; *Randall v. Smith*, 63 Me. 105; *Mills v. Bank of United States*, 24 U. S. 11 Wheat. 431, 6 L. ed. 512; *Coleman v. M'Murdo*, 5 Rand. (Va.) 51; *Winder v. Blake*, 4 Jones, L. 332; *Bank of Washington v. Triplett*, 26 U. S. 1 Pet. 25, 7 L. ed. 37; *Newbold v. Wright*, 4 Rawle, 195; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *Stoecker v. Whitman*, 6 Binn. 416.

**e. Usage Must be Uniform.**—To permit usage to govern and modify the law in relation to dealings of parties it must be uniform, certain and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it. *Citi-*



*zens Bank v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66; *Rapp v. Palmer*, 3 Watts, 178; *Barksdale v. Brown*, 1 Nott & McC. 519; *Harper v. Pound*, 10 Ind. 32; *Smith v. Gibbs*, 44 N. H. 335; *Shackelford v. New Orleans, J. & G. N. R. Co.* 37 Miss. 202. Evidence of particular usage to add to, or in any manner affect the construction of a written contract is admitted only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the contract in reference to it. See *Kirchner v. Venus*, 12 Moore's P. C. 361; *Meyer v. Dresser*, 16 C. B. N. S. 646; *Appleman v. Fisher*, 34 Md. 540; *Southwestern F. & C. Co. v. Stanard*, 44 Mo. 71.

A usage may be proved, though not ancient or general. *Townsend v. Whitby*, 5 Harr. (Del.) 55. But in *Bissell v. Ryan*, 23 Ill. 571, it was said that the true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts were made in reference to it. Also *Leggat v. Sands Brew. Co.* 60 Ill. 158; *Hibler v. McCartney*, 31 Ala. 507; *Winsor v. Dillaway*, 4 Met. 221.

**f. Custom or Usage Must be Shown Reasonable.**—It has been held that a custom or usage is not reasonable, if an honest or right-minded man would deem it unfair or unrighteous. *Paxton v. Courtney*, 2 Fost. & F. 131; *Southwestern F. & C. Co. v. Stanard*, 44 Mo. 71. Where evidence of a usage has been admitted therefore, evidence tending to show that it is unreasonable may be given in reply. *Bottomley v. Forbes*, 5 Bing. N. C. 128.

**g. One Witness not Sufficient to Prove Custom.**—As a general rule, one witness is not sufficient to prove a custom. *Wood v. Hickok*, 2 Wend. 501; *Watts v. Lindsey*, 20 U. S. 7 Wheat. 158, 5 L. ed. 423. But see *Partridge v. Forsyth*, 29 Ala. 200; *Vail v. Rice*, 5 N. Y. 155.

Usage is frequently resorted to, to show that words used in a contract are used in a peculiar, technical or local sense, but the proof of such a usage must be clear and irresistible. *Lewis v. Marshall*, 7 Man. & G. 729, 8 Scott, N. R. 477. Thus usage has been proved to explain the meaning of the following words: "inhabitant," *Rex v. Mashiter*, 6 Ad. & El. 153; "level," as understood by miners, *Clayton v. Greyson*, 5 Ad. & El. 302; "thousand," *Smith v. Wilson*, 3 Barn. & Ad. 728; "weeks," *Grant v. Maddox*, 15 Mees. & W. 737; "months," *Jolly v. Young*, 1 Esp.

186; "days," *Cochran v. Retberg*, 3 Esp. 121; "furs," *Astor v. Union Ins. Co.* 7 Cow. 202; "corn," *Mason v. Skurray*, 1 Park, Ins. 245; "freight," *Peisch v. Dickson*, 1 Mason, 11; "salt," *Journu v. Bourdieu*, 1 Park, Ins. 245; "barrels," *Miller v. Stevens*, 100 Mass. 518, 1 Am. Rep. 139; "roots," as used in insurance policies, *Coit v. Commercial Ins. Co.* 7 Johns. 385; "outfits," *Macy v. Whaling Ins. Co.* 9 Met. 354; "days work," *Hinton v. Locke*, 5 Hill, 437; "wholesale factory price," *Avery v. Stewart*, 2 Conn. 69; "after proof and adjustment thereof," *Allegre v. Maryland Ins. Co.* 6 Har. & J. 408; "cargo," *Allegre v. Maryland Ins. Co.* 2 Gill. & J. 137; "sea-letter," *Sleight v. Rhineland*, 1 Johns. 192; "inevitable dangers of the river," *Gorden v. Little*, 8 Serg. & R. 533; but see *Coxe v. Heisley*, 19 Pa. 247. For other instances see United States and General Digest 3, title "Usages" where is a full collection of the American cases.

In *Sewell v. Corp*, 1 Car. & P. 392, Best, *Ch. J.*, says: "If there is a general usage, applicable to a particular profession, parties employing an individual are supposed to deal with him according to that usage."

**h. Proof must Show Custom to Have Been that Length of Usage which has Become Law.**—Custom is that length of usage which has become a law. It is a usage which has acquired the force of law (Bouvier, *Law Dict. title, "Customs;" Hursh v. North*, 40 Pa. 241); and ignorance of the law will not excuse. A general custom is the common law itself, or a part of it.

Frequent are the expressions in the later authorities that where the usage is of a particular trade or locality, it must appear that it was known to a party before he is bound by it so as to make it a part of his contract. *Walls v. Bailey*, 49 N. Y. 474; *Bradley v. Wheeler*, 44 N. Y. 500; *Higgins v. Moore*, 34 N. Y. 425.

**i. Federal Authorities in Full Accord with State Tribunals.**—The Federal authorities are in strict accord with those of the state tribunals with regard to the admission of parol evidence showing custom and usage to effect a written contract. See *Bliven v. New England Screw Co.* 64 U. S. 23 How. 420, 16 L. ed. 510; *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987; *Robinson v. United States*, 80 U. S. 13 Wall. 363, 20 L. ed. 653; *General Mut. Ins. Co. v. Sherwood*, 55 U. S. 14 How. 351. 14 L. ed. 452.

§ 172. **Parol Evidence to Establish Forfeiture.**—The pre-

vious discussion clearly indicates the liberalizing tendency of our courts to allow all reasonable intendments in reference to written contracts, that a due observance of ordinary precaution would suggest. It remains to notice a solitary instance in which parol evidence to vary the terms of a written instrument is regarded with extreme aversion, and is only tolerated by the courts in cases of absolute necessity. These are instances where it is sought to establish a forfeiture under the terms of a written agreement.

In *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841, it was said by the court: "That forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture or an agreement to do so, on which the party has relied and acted. Any agreement, declaration or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed, under the express letter of the contract."

And substantially to the same effect are *Meyer v. Knickerbocker L. Ins. Co.* 73 N. Y. 516; *Wyman v. Phoenix Mut. L. Ins. Co.* 119 N. Y. 274; *Helme v. Philadelphia L. Ins. Co.* 61 Pa. 107.

**a. Forfeitures not Favored in Law.**—Forfeitures are not favored in the law. They are often the means of great oppression and injustice, and where adequate compensation can be made, the law in many cases, and equity in all cases discharges the forfeiture upon such compensation being made. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689.

**b. Special Province of Equity to Prevent a Forfeiture.**—Equity will frequently seize upon the most shadowy evidence, to prevent a forfeiture. *Doe v. Meux*, 4 Barn. & C. 606; *Doe v. Birch*, 1 Mees. & W. 402; *Ward v. Day*, 4 Best & S. 337. These cases show the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; Strong, Swayne and Field, *Justices*, dissenting.

The evidence which justifies a forfeiture must be of the most positive and convincing character, as no postulate of law commands such universal assent as that requiring conclusive proof in actions of this nature. The rule is of extensive application, and has crystalized into this formula:

“A court of equity abhors forfeitures, and will not lend its aid to enforce them.” *Marshall v. Vicksburg*, 82 U. S. 15 Wall. 146, 21 L. ed. 121. Nor will it give its aid in the assertion of a mere legal right, contrary to the clear equity and justice of the case. *Lewis v. Lyons*, 13 Ill. 117.

§ 173. **Parol Evidence in its Relations to Matters within the Statute of Frauds.**—The intent of one clause of the Statute of Frauds, was to prevent the enforcement of parol contracts above a certain value unless the defendant could be shown to have executed the alleged contract by partial performance as manifested by part payment, or part acceptance, or unless his signature to some written note or memorandum of the bargain, not to the bargain itself, could be shown, and the existence of the note or memorandum presupposes an antecedent contract by parol, of which the writing is a note or memorandum. *Bird v. Monroe*, 66 Me. 337; *Townsend v. Hargraves*, 118 Mass. 325.

It is a simple deduction from this theory of the Statute that parol evidence is always admissible to show that the writing which purports to be a note or memorandum of the bargain is not a record of any antecedent parol contract at all, for as was said by Lord Selborne in *Jervis v. Bertridge*, 27 L. T. N. S. 436, the Statute of Frauds is a weapon of defense, not offense, and does not make any signed instrument a valid contract by reason of the signature if it is not such according to the good faith and real intentions of the parties. *Hildreth v. O'Brien*, 10 Allen, 104; *Rennell v. Kimball*, 5 Allen, 356; *Hazard v. Loring*, 10 Cush. 267; *Butler v. Smith*, 35 Miss. 457, 463; *Leppoc v. Maryland Nat. Union Bank*, 32 Md. 136, 144; *Blake v. Coleman*, 22 Wis. 415; *Shughart v. Moore*, 78 Pa. 469; *James v. Muir*, 33 Mich. 223; *Deshon v. Merchants Ins. Co.* 11 Met. 199; *Earle v. Rice*, 111 Mass. 17, 20; *Grierson v. Mason*, 60 N. Y. 394; *McKesson v. Sherman*, 51 Wis. 303, 312; *Wright v. McPike*, 70 Mo. 175, 179. But see *Wemple v. Knopf*, 15 Minn. 440. In *Kalamazoo Novelty Mfg. Co. v. McAlister*, 40 Mich. 84, Graves, J., said: “In order to exclude oral evidence of a contract, it must be first settled that there is a subsisting written contract between the parties, and where the immediate issue is whether there is or was a writing covering the contract, it is not competent to exclude oral testimony bearing on that issue, upon an assumption of such writing; to do so is to beg the question.”

## § 174. Parol Evidence when Admissible to Show Warranty.

a. **General Rules Respecting Warrants.**—As a general rule, when the contract of the parties is reduced to writing and is apparently complete, the written instrument is supposed to contain the whole contract, and it cannot be varied by parol. This perhaps is the universal rule in respect to contracts relating to personal property. But contracts in respect to the sale and conveyance of land form an exception to this general and salutary rule. It might be more proper to say that such contracts do not come within the general rule. Preceding the conveyance, there is of course, always an agreement of sale. The deed may contain a very small part of such contract. The deed is made only in execution of the contract. It does not attempt to state the entire agreement in respect to the subject matter, but is merely adopted to transfer the title in part execution of the contract, and is manifestly incomplete. Deeds are supposed to contain only the ordinary covenants of title, and seldom, if ever contain a covenant of warranty in respect to the quality of the land. *Green v. Batson*, 71 Wis. 54; *Hahn v. Doolittle*, 18 Wis. 196; *Hubbard v. Marshall*, 50 Wis. 326. This is the general doctrine in the courts of this country. 2 Whart. Ev. § 1026; *Chapin v. Dobson*, 78 N. Y. 74.

b. **A Leading Case Considered.**—The leading case on this topic is the one last cited. And while its authority is very generally sustained, it has been expressly repudiated by the Supreme Court of Iowa in *Mast v. Pearce*, 58 Iowa, 579. Rothrock, J., in writing for reversal cites Benjamin on Sales, § 621, where it is said that if the written sale contains no warranty or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case or to extend it in the latter by inference or implication. And, in 1 Parsons on Contracts, 7 L. ed.\* 589, the author says: "And where the contract of sale is in writing and contains no warranty parol evidence is not admissible to add a warranty." This decision, so decidedly against the weight of authority was the subject of rehearing, and Beck, J., in a brief opinion fully sustained the position of his associate. Without presuming to comment upon the justice of this ruling it may indicate a warning to the practitioner against assuming too much or generalizing too far. In *Chapin v. Dobson*, 78 N. Y. 74, the decision was distinctly put on the ground that the oral agreement as to warranty was collateral.

**c. Further Consideration of the Subject.**—Freeman, in an extended note to *Green v. Batson*, 71 Wis. 54, 5 Am. St. 194, in which the subject is exhaustively reviewed, says: “No citation of authority is necessary to substantiate the rule that where, in the absence of fraud, accident, or mistake, the parties have deliberately put their contract into a writing, which is evidently complete in itself, and couched in such language as imports a legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto, and consequently all prior conversations and negotiations are deemed to be merged therein, and parol evidence of conversations held between the parties, or of declarations made by either of them, whether before or after the completion of the contract, will be rejected. But where the contract as expressed in the writing is manifestly incomplete, parol evidence is admissible to show a contemporaneous agreement that the property should be of a particular quality, kind, or quantity; or if such contract consists of an informal bill or receipt not intended to embrace the entire contract, parol evidence of a warranty is admissible. Citing *inter alia*, *Batterman v. Pierce*, 3 Hill, 171; *Atwater v. Clancy*, 107 Mass. 369, and *Chapin v. Dobson*, 78 N. Y. 74. Now the Iowa case held that in the absence of fraud, accident or mistake, it was incompetent to show a parol warranty of agricultural implements sold by written contract containing no warrant. Cases are found, however, which maintain that where the contract of sale is incomplete, a parol warranty may be shown, as where, in the sale of a horse, a bill of sale is given and a receipt taken for the purchase price, parol evidence is admissible to show that the seller at the time of the sale warranted the horse to be sound, as that did not contradict or vary the writing. *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449.

### § 175. Parol Evidence to Establish a Resulting Trust.

**a. The Subject in its Relations to Evidence.**—Parol evidence is admissible to show facts raising a presumption of a resulting trust, so it is also admissible to rebut that presumption. *Baker v. Vining*, 30 Me. 121; *Welton v. Divine*, 20 Barb. 9.

A leading case on this subject is that of *Boyd v. M'Lean*, 1 Johns. Ch. 582, 1 L. ed. 254. In that case, it was held by Chancellor Kent that if A purchase land with his own money, but the deed is taken in the name of B, a trust results, by operation of

law, to A; and the fact whether the purchase was made with the money of A, on which the resulting trust is to arise, may be proved by parol, it not being within the Statute of Frauds.

It was formerly doubted whether parol evidence was admissible to show payment by a third person in contradiction of the face of the deed expressing payment to have been by the nominal grantee; but it is now clearly settled in the affirmative. Indeed, as has been said by the Supreme Court of New Hampshire, such evidence does not go to contradict the statement in the deed that the grantee paid the money, but to show the further fact that the money did not belong to him, but to the person claiming the trust. Whether parol evidence to show the ownership of the purchase money is admissible in opposition to the answer of the trustee denying the trust, is doubted by *Sir Edward Sugden* upon the authority of certain early English cases; but it is now settled, at least in this country, that it is admissible. It has been maintained by eminent English writers that parol evidence, even of the confession of the nominal purchaser, cannot be received to set up a resulting trust after his death; but this position seems to be not now admitted in England, and in our courts may be fairly said not to prevail. See *Browne*, Stat. of Frauds, § 93. The learned author supports the proposition of the above paragraph by the following citation of authorities: *Livermore v. Aldrich*, 5 Cush. 435; *Page v. Page*, 8 N. H. 187; *Gardiner Bank v. Wheaton*, 8 Me. 373; *Botsford v. Burr*, 2 Johns. Ch. 405, 1 L. ed. 426; *Boyd v. M'Lean*, 1 Johns. Ch. 582, 1 L. ed. 254; *Blodgett v. Hildreth*, 103 Mass. 484; *Pritchard v. Brown*, 4 N. H. 397; *Sugden*, Vend. & P. 909, and cases there cited; *Elliott v. Armstrong*, 2 Blackf. 198; *Jenison v. Graves*, 2 Blackf. 440; *Blair v. Bass*, 4 Blackf. 539; 1 *Sanders*, Uses and Trusts, 123; *Roberts*, Stat. of Frauds, 99. See *Barnes v. Taylor*, 27 N. J. Eq. 259.

The correct view seems to be this: That equity will at all times lend its aid to defeat a fraud, notwithstanding the Statute of Frauds; any unconscionable act by which it is sought to defraud a party calls for the protection of the court, and parol evidence is always admissible to show the fraud. *Ryan v. Dox*, 34 N. Y. 307.

**b. Wills no Exception.**—There is no material difference of principle in the rules of interpretation between wills and contracts, except what naturally arises from the different circum-

stances of the parties. The object in both cases is the same, namely, in either case, put themselves in the place of the party, and then see how the terms of the instrument affect the property or subject matter. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument. Greenleaf, Ev. § 287. The propriety of admitting such evidence in order to ascertain the meaning of doubtful words or expression in a will, is expressly conceded by Marshall, *Ch. J.*, in *Smith v. Bell*, 31 U. S. 6 Pet. 75, 8 L. ed. 325.

We may regard it as settled that a testator's intentions cannot be proved by parol for the purpose of varying or even explaining his will, or in other words, of clearing patent ambiguities. No doubt we have early English cases where a less stringent rule was sustained, but these cases are now discredited, and with them should fall the American rulings to which they for a time give rise. Acting on the strict principle of exclusion we have noticed, the English courts have rejected evidence when tendered to show what persons a testator meant to include or exclude in employing the word "relations;" what articles he intended to give by the word "plate" and what property he meant to devise by the words "lands out of settlement," or by other generic terms.

It has been further ruled that when the description of a devise applies with exactitude to one person, parol evidence is inadmissible to show that another person, less exactly described, is the intended object of the testator's bounty. It is otherwise in case of latent ambiguity. See Wharton, Ev. §§ 993, 994, and cases cited.

§ 176. **Parol Evidence to Contradict Consideration Expressed.**—In the absence of fraud, parol testimony is inadmissible to prove total lack of consideration for a conveyance purporting to have been made for a consideration. *Gardner v. Lightfoot*, 71 Iowa, 577.

A deed given in good faith for a valuable consideration recited, without fraud, accident or mistake, cannot be shown by parol to be without consideration. *Fenney v. Howard*, 79 Cal. 525.

Parol evidence is not admissible to show that there was in fact no consideration for a quitclaim deed expressing a consideration in money, and that the grantee agreed by parol to hold the lands for the grantor. *Salisbury v. Clarke*, 61 Vt. 453.

Parol evidence is inadmissible to vary a written covenant under



guise of showing consideration. *Simanovich v. Wood*, 5 New Eng. Rep. 190, 145 Mass. 180.

The obligations under a written lease of a farm cannot be affected by evidence of a contemporary parol contract, as part of the consideration of the lease. *Diven v. Johnson*, 3 L. R. A. 308, 117 Ind. 512.

Parol evidence of what was said at the time of signing the contract is not admissible to vary it. *Express Pub. Co. v. Aldine Press*, 126 Pa. 347; *Gorsuch v. Rutledge*, 70 Md. 272.

Previous conversations of the parties are not admissible to determine their intention. *Pilmer v. Branch of State Bank*, 16 Iowa, 321; *Pollen v. LeRoy*, 10 Bosw. 38; *Sayre v. Peck*, 1 Barb. 464; *Ellmaker v. Franklin F. Ins. Co.* 5 Pa. 183; *Bedford v. Flowers*, 11 Humph. 242; *Van Buskirk v. Day*, 32 Ill. 260.

Parol evidence as to what the parties understood or intended a written agreement to mean, and as to subsequent conversations between them as to what they would do in pursuance of the agreement is not admissible, where the written agreement itself shows the true construction. *Miller v. Butterfield*, 79 Cal. 62.

As between immediate parties, it is admissible to impeach the consideration of an instrument. *Farwell v. Ensign*, 10 West. Rep. 564, 66 Mich. 600.

Such evidence ought not to be excluded merely because such consideration was expressed in a writing distinct from the contract. *Wolf v. Fletemeyer*, 83 Ill. 418.

A defendant, sued on an agreement by him to pay to plaintiff a balance due on notes given by a third party, may introduce evidence to show that the consideration of such agreement by him was an executory promise by plaintiff, and that such promise remains unfulfilled. *DeCamp v. Scofield*, 75 Mich. 449.

Where a collateral agreement whether written or oral, constitutes a condition upon which the performance of a written contract depends; or where a contemporaneous agreement of one party forms the consideration for the written agreement in question, such collateral or contemporaneous agreement may be shown. *Singer Mfg. Co. v. Forsythe*, 6 West. Rep. 553, 108 Ind. 334.

Parol evidence is admissible to show that at the time the assignment was executed a contemporary agreement was the consideration of the assignment. *Barclay v. Wainwright*, 86 Pa. 191.

Where in pursuance of a previous parol agreement a debtor conveys his entire interest in a mine to his creditor, parol evidence is admissible to prove the consideration both of the deed and the parol agreement. *Adams v. Lambard*, 80 Cal. 426.

The consideration of a mortgage may be proved by parol, but an agreement destroying the effect of covenants therein contained cannot be so proved. *Murdock v. Cox*, 118 Ind. 266.

The actual consideration which passes between the parties may be shown by parol testimony to be different from the consideration recited in a conveyance (*Howell v. Moores*, 127 Ill. 67); different in kind from that expressed in the deed. *Scoggin v. Schloath*, 15 Or. 380.

It is admissible to show that the true amount of the consideration which passed between the parties was different from that in the deed. *Booth v. Hynes*, 54 Ill. 363.

It is admissible to show the circumstances under which an assignment of a judgment was made, and the actual consideration. *Wade v. Carter*, 76 N. C. 171.

Parol evidence is admissible to prove the consideration of the bond and the character of the contract. *Wrightsmen v. Bowyer*, 24 Gratt. 433.

Parol evidence of the consideration of a written contract for the sale of a house and store may be given. *Fusting v. Sullivan*, 41 Md. 162.

Where a note recites no particular consideration, the consideration may be shown by extrinsic evidence. *Martin v. Stubbings*, 126 Ill. 387.

Parol evidence is admissible to supply the omission of the consideration stated. *Nedvidek v. Meyer*, 46 Mo. 600.

The recital in a contract of a money consideration paid does not exclude parol evidence of an additional consideration. *Bolles v. Sachs*, 37 Minn. 315; *Laudman v. Ingram*, 49 Mo. 212.

Evidence of a verbal collateral promise is admissible to show an additional consideration for the execution of a written contract. *Raub v. Barbour*, 11 Cent. Rep. 717, 6 Mackey, 245; *Wood v. Moriarty*, 4 New Eng. Rep. 269, 15 R. I. 518; *Kickland v. Menasha Wooden Ware Co.* 68 Wis. 34.

Parol evidence to show that an antenuptial contract was made in consideration of a note for \$1,000, in addition to the consideration specially named therein, which was a note of \$300, payable at

the husband's death, and semi-annual payments of \$30 each, is admissible. *Arms v. Arms*, 113 N. Y. 646.

### § 177. Parol Evidence to Show Merger.

**a. Merger not Prevented by After Intention.**—A union of the legal and equitable estates in one and the same persons, operates as an extinguishment of an incumbrance in the absence of a controlling intention, as that intention existed at the time the two interests came together.

If there was then no intention to keep the incumbrance alive, a merger cannot be prevented by an intention afterwards formed and expressed, or from a subsequent change of circumstances from which an intention might be inferred. *Cole v. Edgerly*, 48 Me. 108; *Given v. Marr*, 27 Me. 212; *Hunt v. Hunt*, 14 Pick. 374, 383; *Gardner v. Astor*, 3 Johns. Ch. 53, 1 L. ed. 540; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135–157, 7 L. ed. 800–808; *Champney v. Coope*, 34 Barb. 539; *Aiken v. Milwaukee & St. P. R. Co.* 37 Wis. 469. Where the intention is expressed, it may be by the manner in which the incumbrance is transferred, as to a trustee for the owner of the land or by recitals or other language in the assignment of the security or conveyance of the land; no particular mode is requisite, provided the intention is sufficiently declared. *Bailey v. Richardson*, 9 Hare, 734; *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244; *Spencer v. Ayrault*, 10 N. Y. 202; and see as to the effect of such recitals, *Bean v. Boothby*, 57 Me. 295; *Campbell v. Knight*, 24 Me. 332; *Crosby v. Chase*, 17 Me. 369; *Crosby v. Taylor*, 15 Gray, 64.

**b. Rule where Intention is not Expressed.**—If there is no expression of the intention at the time, then all the circumstances will be considered in order to discover what is for the best interests of the party. He will be presumed to have intended that the charge should be kept alive or should merge according to the benefit resulting from either. If a merger would let in other incumbrances which he was not already bound to pay, this is a circumstance almost decisive of an intention not to permit a merger. *Swinfen v. Swinfen*, 29 Beav. 199; *Davis v. Barrett*, 14 Beav. 542; *Hatch v. Skelton*, 20 Beav. 453; *Clarendon v. Barham*, 1 Younge & C. 688. If after the ownership and the charge have become united the party does any act which clearly shows that he regards the incumbrance as still subsisting, this is strong even if not conclu-

sive evidence of an intent that there should be no merger (*Powell v. Smith*, 30 Mich. 451); as, for example, if he transfers the mortgage and bequeaths the incumbrance in specific terms, (*Blundell v. Stanley*, 3 DeG. & S. 433; and see *Wilkes v. Collins*, L. R. 8 Eq. 338); or devises the land subject to the charge. *Hatch v. Skelton*, 20 Beav. 453; but see for, a limitation, *Johnson v. Webster*, 4 DeG. M. & G. 474; *Astley v. Milles*, 1 Sim. 298. A devise of the land without mentioning the incumbrances, is some evidence of an intention that it should merge. *Swinfen v. Swinfen*, *supra*. See generally on this subject Pomeroy, Eq. Jur. § 792.

### § 178. Parol Evidence to Impress a Trust, and Evidence of Co-tenancy.

**a. Familiar Principle of Equity Jurisdiction Stated.**—It is a familiar principle of equity jurisdiction, that where the consideration or purchase price is paid by one party and the title to property purchased is vested in still another party, equity will impress a trust upon the person holding the legal or equitable title and parol evidence may be introduced showing the existence of such facts. *Baker v. Vining*, 30 Me. 127; *Page v. Page*, 8 N. H. 187; *Pinney v. Fellows*, 15 Vt. 525; *Peabody v. Tarbell*, 2 Cush. 232; *Kendall v. Mann*, 11 Allen, 15; *Blodgett v. Hildredth*, 103 Mass. 487; *Barrows v. Bohan*, 41 Conn. 278; *Boyd v. M'Lean*, 1 Johns. Ch. 582, 1 L. ed. 254; *Jackman v. Ringland*, 4 Watts & S. 149; *McGinity v. McGinity*, 63 Pa. 38; *Creed v. Lancaster Bank*, 1 Ohio St. 194; *Hollis v. Hayes*, 1 Md. Ch. 479; *United States Bank v. Carrington*, 7 Leigh, 566; *Phelps v. Seely*, 22 Gratt. 587; *Parmlee v. Sloan*, 37 Ind. 469; *Kane County v. Herrington*, 50 Ill. 232; *M'Guire v. M'Gowan*, 4 Desaus. Eq. 486; *Price v. Brown*, 4 S. C. 144; *Harvey v. Ledbetter*, 48 Miss. 95; *McCarroll v. Alexander*, 48 Miss. 128; *Paul v. Chouteau*, 14 Mo. 580; *Faris v. Dunn*, 7 Bush, 276; *Holder v. Nunnally*, 2 Coldw. 288; *Pillow v. Thomas*, 1 Baxt. 121; *Byers v. Danley*, 27 Ark. 77; *Oberthier v. Stroud*, 33 Tex. 522. See *Nicklin v. Wythe*, 2 Sawy. 535.

**b. Position of United States Supreme Court.**—The United States Supreme Court has been singularly emphatic in stating its position as regards this principle and allows parol evidence to be introduced to show a transfer of personal property absolute in its terms to have been intended as a mere security. *Mr. Justice Field*, in delivering the unanimous opinion of the court, says:

"A court of equity looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice. *Hughes v. Edwards*, 22 U. S. 9 Wheat. 489, 6 L. ed. 142; *Russell v. Southard*, 53 U. S. 12 How. 139, 13 L. ed. 927; *Taylor v. Luther*, 2 Sumn. 228; *Pierce v. Robinson*, 13 Cal. 116;" *Brick v. Brick*, 98 U. S. 514, 25 L. ed. 256.

c. **Authorities Collected.**—If a trust is declared in writing, parol evidence is inadmissible to contradict the expressed intentions of the instrument (*Lewis v. Lewis*, 2 Rep. in Ch. 77; *Finch's Case*, 4 Inst. 86; *Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 987, 9 Am. Dec. 256; *Simms v. Smith*, 11 Ga. 198; *Dickenson v. Dickenson*, 2 Murph. 279; *Lloyd v. Inglis*, 1 Desaus. Eq. 333; *Harris v. Barnett*, 3 Gratt. 339; *Mann v. Mann*, 1 Johns. Ch. 234, 1 L. ed. 124; *Ashley v. Robinson*, 29 Ala. 112, 65 Am. Dec. 387; *Sturtevant v. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 371; *Lake v. Freer*, 11 Ill. App. 576); but if the instrument is vague and ambiguous, parol evidence may be introduced to assist in its interpretation. *Steere v. Steere*, *supra*; *Forster v. Hale*, 3 Ves. Jr. 696; *Taylor v. Taylor*, 1 Atk. 386. An absolute conveyance of land cannot be shown by the grantor to be a grant in trust for himself, no fraud or mistake being alleged (*Sturtevant v. Sturtevant*, *supra*), and evidence tending to show that a deed absolute on its face is a mortgage or a conveyance in trust, should be clear and received with great caution. *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Hurst v. Harper*, 14 Hun, 283; *Horn v. Keteltas*,

42 How. Pr. 152; *McMahon v. Macy*, 51 N. Y. 161. Want of consideration for a deed, possession of land by the grantor after conveyance, and the nonpayment of the purchase money, may be put in evidence to show a trust relation. *Vandever v. Freeman*, 20 Tex. 33, 70 Am. Dec. 391.

If the instrument in any way indicates an intention of making a person the holder of both the legal and beneficial estate, a trust cannot be created by parol. Lewin, *Trusts*, 51; *Dean v. Dean*, 6 Conn. 285; *Philbrook v. Delano*, 29 Me. 410; *Starr v. Starr*, 1 Ohio, 321; *Hutchinson v. Tindall*, 3 N. J. Eq. 357. Neither can there be a trust by parol where a valuable consideration is paid. *Ibid.* Gilbert, *Uses and Trusts*, 56, 57; *Pilkington v. Bayley*, 7 Bro. P. C. 383; unless it can be proved by a person not privy to a deed. *Squire's App.* 70 Pa. 266; *Strong v. Glasgow*, 2 Murph. 289. Where property was conveyed for the benefit of a child, though no declaration of trust appeared in the deed, evidence was admitted to prove it. *Gay v. Hunt*, 1 Murph. 141; *Ross v. Norvell*, 1 Wash. 14, 1 Am. Dec. 422. Whenever parol evidence is admitted to prove a trust or establish a trust it must be very clear and satisfactory. *Sneling v. Utterbaek*, 1 Bibb, 609, 4 Am. Dec. 661; *Hunter v. Bilyeu*, 30 Ill. 246; *Harrison v. Howard*, 1 Ired. Eq. 407; *Brady v. Parker*, 4 Ired. Eq. 430; *Lyman v. United Ins. Co.* 2 Johns. Ch. 630, 1 L. ed. 519; *Philpott v. Elliott*, 4 Md. Ch. 273.

### § 179. Parol Evidence in Cases of Fraud.

**a. Policy of the Law.**—It is the sound policy of the law to encourage the exposure of fraud and deceit, and to give great latitude to the evidence through which it is sought to establish a fraud (*Davenport v. Cummings*, 15 Iowa, 219; *Ferris v. Irons*, 83 Pa. 179; *Blue v. Penniston*, 27 Mo. 272); and however trivial the facts relied upon to sustain an allegation of fraud, if at all relevant to the issue, they are admissible. *Walters v. Dashiell*, 1 Md. 455; *Curtis v. Moore*, 20 Md. 93; *Baltimore & O. R. Co. v. Hoge*, 34 Pa. 214.

**b. True Test Stated.**—The line of cleavage in these cases is frequently very vague and probably the true test, that is the one warranted by the facts and circumstances surrounding most controversies of this character, is whether the evidence can throw any light upon the transaction, or is so hopelessly and obviously irrelevant as to come within the sphere of judicial condemnation.

*Zerbe v. Miller*, 16 Pa. 488; *Heath v. Page*, 63 Pa. 108; *Blue v. Penniston*, 27 Mo. 272; *Wright v. Linn*, 16 Tex. 34; *Cooke v. Cooke*, 43 Md. 522. The relevancy of a given fact as has been shown in the preceding chapter upon that topic, does not depend upon its force, but upon its bearing. If it bears indirectly or directly with any weight whatever on the main controversy, or any material part of it, it is admissible. It is sometimes sought to foist upon the record or lodge upon the minds of the jury prejudicial matters regarding the testimony of the witness or the facts in the case. Disreputable practice of this nature is too frequently seen even in our courts of exclusive jurisdiction. It is almost surplusage to state that evidence not addressed directly to the issues, or which is merely calculated to generate suspicion and distrust, is inadmissible. *Davenport v. Wright*, 51 Pa. 392; *Boylston v. Carver*, 11 Mass. 515.

c. **The Controlling Inquiry.**—The controlling inquiry in all cases where it is sought to set aside a conveyance on the ground that it is fraudulent, is what actual consideration passed, and was it made with an intent to hinder, delay or defraud creditors, and this intent is an emotion of the mind, and can usually be shown only by the acts and declarations of the party. *Babcock v. Eckler*, 24 N. Y. 623.

d. **Acts and Declarations Usually Characterizing Fraudulent Intent.**—These acts and declarations and all the concomitant circumstances must be established, and then the motive may be deduced from them in accordance with those principles which are shown by experience and observation to rule human conduct. *Filley v. Register*, 4 Minn. 391. The proof in each case will consequently depend upon its own circumstances. *Huff v. Roane*, 22 Ark. 184; *Harrell v. Mitchell*, 61 Ala. 270. It usually consists of many items of evidence, which, standing detached and alone, would be immaterial, but which, in connection with others, tend to illustrate and shed light upon the character of the transaction and show the position in which the parties stand, and their motives, conduct and relations to each other. *Quae tingula non prosunt, juncta juvant*. Although the evidence is generally circumstantial it is often as potent as direct testimony. Sometimes a combination of circumstances characterize a transaction so plainly and so clearly as to stamp upon it unerring and indelible marks of fraud which cannot be mistaken, and the transaction

itself presents phrases so remarkable and peculiar that no fair minded person can hesitate to pronounce it fraudulent. These *indicia* are often the clearest proof and quite as reliable as positive evidence. *Newman v. Cordell*, 43 Barb. 448; *Boies v. Henney*, 32 Ill. 130; *Hopkins v. Sievert*, 58 Mo. 201.

§ 180. **Parol Proof as Original Evidence.**—The existence of documentary evidence that might show the nature and character of a transaction does not *per se* ignore all parol evidence of the fact unless the document in question is expressly made by the parties to it, the sole repository and memorial of the transaction.

Frequent illustrations occur in the every day business experience of most men; a methodical, painstaking person, rather than be dependent upon the infirmities and frailties of memory reduces the facts of a transaction to carefully written statements. This is done at the time while every incident is vivid in the memory, and there is an entire absence of all motive to garble or distort. Now it is perfectly apparent that this statement or memorandum is a much more authentic vehicle of the facts comprising the agreement made than an oral statement of one of the parties months or possibly years after the occurrence. And yet, there is no exclusionary principle that should intervene against the parol testimony. There was no mutual understanding to the effect that the written statement should ever be relied upon as the authentic and sole method of proving the transaction. The degree of credit might be infected—the jury might attach greater weight to the written testimony, the court might view with diminished suspicion—the probabilities of the case if sustained by documentary rather than parol evidence, but offsetting all this is the actual fact that the parol evidence is competent under any scheme of evidence, and that it would be reversible error to exclude it from consideration. *Churchman v. Lewis*, 34 N. Y. 444.

Oral evidence must in all cases be direct, that is to say:

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it.

If it refers to a fact alleged to have been perceived, by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner if it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. Stephen's Dig. Art. 62.



### § 181. Parol Evidence to Vary Terms of a Written Contract.

a. **Limitations of the Rule.**—The rule against contradicting the tenor of a written instrument by parol does not apply to strangers. *Burns v. Thompson*, 91 Ind. 146; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591; *Masterson v. Boyce*, 29 Hun, 456; *Hussman v. Wilke*, 50 Cal. 250; *Smith v. Moynihan*, 44 Cal. 53; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222; *Brown v. Thurber*, 77 N. Y. 613, 58 How. Pr. 95.

The rule excluding parol evidence of written contracts is confined to the parties to the contract, and does not preclude strangers to it from introducing such evidence. *Talbot v. Wilkins*, 31 Ark. 411; *Coleman v. Pike County*, 83 Ala. 326.

A writing made by a grantor after the execution of his deed is not admissible against a grantee who has never signed the instrument. *Schwalbach v. Chicago, M. & St. P. R. Co.* 73 Wis. 137.

The rule admitting extraneous evidence does not apply to a contract to convey, or to an agreement to give a bond to convey where title derived is from a stranger. *Tobey v. Leonard*, 2 Cliff. 40.

b. **Rule In Cases of Illegal Contract.**—Parol evidence is inadmissible whenever the contract is in fraud of law. *Lazare v. Jacques*, 15 La. Ann. 599.

It is admissible to prove the instrument void, or inefficacious, or that the consideration has failed (*Corbin v. Sistrunk*, 19 Ala. 203); or to show that the instrument was void, or that it never had any legal existence or binding force for want of due delivery and acceptance (*Leppoc v. Maryland Nat. Union Bank*, 32 Md. 136); or void because made in furtherance of an illegal object. *Martin v. Clarke*, 8 R. I. 389.

It is admissible to show that the contract never existed where its existence is the immediate issue (*Kalamazoo Novelty Mfg. Works v. McAlister*, 40 Mich. 84); or that it never existed because induced by fraudulent representations (*Jamison v. Ludlow*, 3 La. Ann. 492); or to show that a signature to the instrument was obtained by fraud. *Lull v. Cass*, 43 N. H. 62.

It can always be shown in a suit at law or in equity that an instrument produced in evidence was never executed by the person whose signature it bears. *Marsh v. Nichols*, 128 U. S. 605, 32 L. ed. 538.

It may be shown that a patent for an invention was never signed by the officers whose names were attached to it. *Ibid.*

It is admissible to vary or contradict a written document introduced to support a usurious contract (*Fenwick v. Ratliff*, 6 T. B. Mon. 154); or to show that a written act contravenes the law passed in the interest of public morals. *Fletcher's Succession*, 11 La. Ann. 59.

Testimony to contradict a deed by denying that any consideration was paid is admissible. *McCampbell v. Durst*, 73 Tex. 410.

The rule which excludes parol evidence is inapplicable to evidence of failure of consideration. *Meyer v. Casey*, 57 Miss. 615.

Parol evidence is admissible to show want, failure or illegality of consideration of a contract (*Waymack v. Heilman*, 26 Ark. 449); as that the seller agreed to take confederate money in payment, although nothing appeared upon the face of the contract. *Donley v. Tindall*, 32 Tex. 43.

**c. Gillespie v. Moon Examined.**—The case of *Gillespie v. Moon*, (2 Johns. Ch. 585, 1 L. ed. 500), is in every respect instructive and suggestive as affording ample vindication of the principle contended for in the text. Aside from the wide acceptance which the decision in that justly celebrated case has received and apart from the logical force and consistency of the reasoning employed by *Chancellor Kent*, the case derives additional interest as affording grounds for an exhaustive monographic note from Mr. Robert Desty, found in the edition of the Chancery reports above cited. This singularly thorough review is practically a digest of the subject and its exceptional merits seem to demand its reproduction in this connection more especially as the evidentiary principles implicated with this particular branch of our topic are either expressly referred to, or are necessarily implied; the note proceeds in the following language:

**d. Authority of Courts of Equity to Relieve from Mistake.**—Courts of equity will relieve against the results of ignorance and error. Thus relieving they will reform a written evidence of contract if through misapprehension or mistake it should not express the intention of the parties; and parol testimony will be admitted to show such misapprehension or mistake. Cited in *Greer v. Caldwell*, 14 Ga. 215, 15 Am. Dec. 558; *Humphreys v. Hurtt*, 5 Thomp. & C. 433; *Glass v. Hulbert*, 102 Mass. 34, 3 Am. Rep. 427. See *Towers v. Moor*, 2 Vern. 98; *Langley v. Brown*, 2 Atk. 203; *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Gordon v. Hertford*, 2 Madd. 120; *Garrard v. Grinling*, 2

Swanst. 248; *Willan v. Willan*, 16 Ves. Jr. 82; *Wiser v. Blachly*, 1 Johns. Ch. 607, 1 L. ed. 263; *Quick v. Stuyvesant*, 2 Paige, 84, 2 L. ed. 823; *Blanchard v. Kenton*, 4 Bibb. 451; *Todd v. Rivers*, 1 Desaus. Eq. 155; *Lindley v. Sharp*, 7 T. B. Mon. 252; *Murphy v. Trigg*, 1 T. B. Mon. 73; *Bryce v. Lorrillard F. Ins. Co.* 55 N. Y. 240; *Welles v. Yates*, 44 N. Y. 525; *Coles v. Bowne*, 10 Paige, 526, 4 L. ed. 1076. They will relieve on proof that the intent of the parties would be rectified. Cited in *Firmstone v. De Camp*, 17 N. J. Eq. 315. See *Skillman v. Teeple*, 1 N. J. Eq. 232; *Lyman v. United Ins. Co.* 17 Johns. 377; *Hendrickson v. Ivins*, 1 N. J. Eq. 562. The power to rectify mistakes is not limited to those cases where the language used is not in the very words intended, but reaches those cases where in consequence of a mistake of fact, the meaning and intentions of the parties are not expressed by the words. Cited in *Smith v. Jordan*, 13 Minn. 271; *De Peyster v. Hasbrouck*, 11 N. Y. 591; *Talley v. Courtney*, 1 Heisk. 718. See *Bradford v. Union Bank of Tennessee*, 54 U. S. 13 How. 57, 14 L. ed. 49; *McCurdy v. Breathitt*, 5 T. B. Mon. 234; *Burdett v. Simms*, 3 J. J. Marsh. 190.

**e. Parties Entitled to Relief.**—Relief against the operation of a written instrument on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. Cited in *Glass v. Hurlburt*, 102 Mass. 41, 3 Am. Rep. 427. Explained in *Worley v. Tuggle*, 4 Bush. 194. See *Canedy v. Marcy*, 13 Gray, 373; *Keisselbrack v. Livingston*, 4 Johns. Ch. 148, 1 L. ed. 796. It is not material whether the instrument is an executory or an executed agreement, nor is it material whether the proceeding is directly by bill to correct the mistake or the mistake is set up in the answer by way of defense. Cited in *Leitensdorfer v. Delphy*, 15 Mo. 167, 55 Am. Dec. 140; 2 Pom. Eq. Jur. 334. See *Wadsworth v. Wendall*, 5 Johns. Ch. 224, 1 L. ed. 1064; *Higginbotham v. Burnet*, 5 Johns. Ch. 184, 1 L. ed. 1050; *Chamberlain v. Thompson*, 10 Conn. 244; *Wiser v. Blachly*, 1 Johns. Ch. 607, 1 L. ed. 263; *White v. Wilson*, 6 Blackf. 448; *Newsom v. Bufferlow*, 1 Dev. Eq. 379; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795; *Phyfe v. Wardell*, 2 Edw. Ch. 47, 6 L. ed. 304; *Coles v. Bowne*, 10 Paige, 526, 535, 4 L. ed. 1076, 1080; *Hendrickson v. Ivins*, 1 N. J. Eq. 562; *Workman v. Guthrie*, 29 Pa.

495; *Raffensberger v. Cullison*, 28 Pa. 426; *Tyson v. Passmore*, 2 Pa. 122. It is competent to set up mistake in the contract by way of equitable defense to a motion for an injunction. Cited in *Woodworth v. Cook*, 2 Blatchf. 159; *Gibson v. Cook*, 2 Blatchf. 148. See *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174, 5 L. ed. 589; *Joyes v. Statham*, 3 Atk. 389; *Clark v. Grant*, 14 Ves. Jr. 519; *Price v. Dyer*, 17 Ves. Jr. 357; *Pitcairn v. Ogbourne*, 2 Ves. Sr. 375.

**f. Mutuality of Mistake Necessary to Reformation of Contract.**—Mistake of a material fact by one of the parties to a contract renders it voidable in equity, and an action lies for its rescission; but it cannot in general be reformed, as in such cases there is no mutual agreement. Cited in *Smith v. Mackin*, 4 Lans. 46. A mutual mistake which will afford ground for relief from a contract by reforming it means a mistake reciprocal and common to both parties, where each alike labors under the misconception in respect to the terms of the written instrument. Cited in *Botsford v. McLean*, 45 Barb. 481. See *Henkle v. Royal Exch. Assur. Co.* 1 Ves. Sr. 317; *Townshend v. Stangroom*, 6 Ves. Jr. 331; *Shelburne v. Inchiquin*, 1 Bro. Ch. 340. If the mistake has not been mutual but made inadvertently on one side and yet in good faith by the other. If any amendment or reformation of the contract can under any circumstances be made it cannot be made so as to make the agreement conform merely to the views of the party applying, but only to the original views of both parties. In this latter case there may be a rescission on the ground that the parties minds never met, but there can be no reformation or change of the contract making it substantially a new one. Cited in *Humphreys v. Hurtt*, 20 Hun, 400. See *Moran v. McLarty*, 11 Hun, 66, affirmed 75 N. Y. 25; *Jackson v. Andrews*, 59 N. Y. 244; *Bryce v. Lorillard Ins. Co.* 55 N. Y. 240; *Welles v. Yates*, 44 N. Y. 525; *Nevius v. Dunlap*, 33 N. Y. 676; *Rider v. Powell*, 28 N. Y. 310; *Botsford v. McLean*, 45 Barb. 478; *Kent v. Manchester*, 29 Barb. 597; *Pennell v. Wilson*, 2 Abb. Pr. N. S. 466, 469; *Lyman v. United Ins. Co.* 17 Johns. 373; *McHugh v. Imperial F. Ins. Co.* 48 How. Pr. 230; *Hearne v. Marine F. Ins. Co.* 87 U. S. 20 Wall. 488, 490, 22 L. ed. 395, 396; *Beaumont v. Bramley*, Turn. & R. 41; *Humphreys v. Hurtt*, 5 Thomp. & C. 433; *Fowler v. Fowler*, 4 DeG. & J. 255; *Sells v. Sells*, 1 Drew. & S. 42; *Whittemore v. Farrington*, 76 N. Y. 452. While parol evidence is permissible to show a mistake in a written agreement

yet to justify a reformation of the instrument on that ground the mistake should be proved as much to the satisfaction of the court as if admitted. Cited in *Ford v. Joyce*, 78 N. Y. 618. A written contract in the absence of fraud can only be reformed where it is shown by satisfactory proof that there is a plain mistake in the contract, by the accidental omission or insertion of a material stipulation contrary to the intention of both parties, by expressing something different in substance from the truth of that intent and under a mutual mistake. Cited in *Wemple v. Stewart*, 22 Barb. 158.

**g. Relief Obtainable in Equity.**—Relief in equity can be had against any deed or contract in writing founded on mistake or fraud. Cited in *Rosevelt v. Dale*, 2 Cow. 133; *Walden v. Skinner*, 101 U. S. 585, 25 L. ed. 966; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 89, 25 L. ed. 54; *Elder v. Elder*, 10 Me. 86, 25 Am. Dec. 208; *Champlin v. Laytin*, 18 Wend. 422, 31 Am. Dec. 393; *Welles v. Yates*, 44 N. Y. 529; *Hutcheon v. Johnson*, 33 Barb. 398; *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 176; *Alden v. Pryal*, 60 Cal. 222; *Faure v. Martin*, 7 N. Y. 213; *Wood v. Hubbell*, 10 N. Y. 487; *Funch v. Abenheim*, 20 Hun, 6; *Kent v. Manchester*, 29 Barb. 598; *Huss v. Morris*, 63 Pa. 372; *Fishell v. Bell*, 1 Clark Ch. 38, 7 L. ed. 45; *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 658; *Reading v. Westson*, 8 Conn. 122, 20 Am. Dec. 99; *Firmstone v. De Camp*, 17 N. J. Eq. 315. The correction of mistakes in written instruments occurring by accident, fraud or otherwise has been one of the acknowledged branches of equity jurisdiction from the earliest history of the court. Cited in *Andrews v. Gillespie*, 47 N. Y. 491. It was an essential ingredient to any relief under this head that it should be on an accident perfectly distinct from the sense of the instrument. Cited in *Faure v. Martin*, 7 N. Y. 219, 57 Am. Dec. 518. See *Shelburne v. Inchiquin*, 1 Bro. Ch. 350; Story, Eq. Jur. §§ 121–194. A policy of insurance is as much within the reach of the principle as any other written contract. Applied, *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 10. Cited in *Carpenter v. Providence Wash. Ins. Co.* 45 U. S. 4 How. 224, 11 L. ed. 949. When reformation is sought of a deed which through fraud or mistake conveyed less land than was orally bought and paid for, the case does not stand as if there were no deed; and the error may be corrected without proof of such part performance as is necessary for

a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed. Cited in *Hitchins v. Pettingill*, 58 N. Y. 389. See *Doe v. Doe*, 37 N. Y. 268, 285; *Herbert v. Odlin*, 40 N. H. 267; *Brown v. Glines*, 42 N. H. 160; *Kennard v. George*, 44 N. H. 440; *Leach v. Noyes*, 45 N. H. 364; *Tucker v. Madden*, 44 Me. 206; *Adams v. Stevens*, 49 Me. 362; *Burr v. Hutchinson*, 61 Me. 514; *Blodgett v. Hobart*, 18 Vt. 414; *Brown v. Lamphear*, 35 Vt. 252; *Shattuck v. Gay*, 45 Vt. 87; *Blakeman v. Blakeman*, 39 Conn. 320; *Wiswall v. Hull*, 3 Paige, 313, 3 L. ed. 168; *Ehleringer v. Moriarty*, 10 Iowa, 78; *Barber v. Lyon*, 15 Iowa, 37.

**h. Instances of Mistake, Relief from.**—Among the ordinary examples of such errors are those as to the legal effect of a description of the subject matter and as to the import of the technical words and phrases; but the rule is not confined to these instances. Cited in 2 Pom. Eq. Jur. 309. See *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174, 5 L. ed. 589, 26 U. S. 1 Pet. 1, 7 L. ed. 27; *Pitcher v. Hennessey*, 48 N. Y. 415; *Lanning v. Carpenter*, 48 N. Y. 408; *O'Donnell v. Harmon*, 3 Daly, 424; *Canedy v. Marcy*, 13 Gray, 373-377; *Stedwell v. Anderson*, 21 Conn. 139; *Huss v. Morris*, 63 Pa. 367; *Moser v. Libenguth*, 2 Rawle, 428; *Cooke v. Husbands*, 11 Md. 492; *Springs v. Harven*, 3 Jones, Eq. 96; *Larkins v. Biddle*, 21 Ala. 252; *Stone v. Hale*, 17 Ala. 557; *Clopton v. Martin*, 11 Ala. 187; *Clayton v. Freet*, 10 Ohio St. 544; *Young v. Miller*, 10 Ohio, 85; *McNaughten v. Partridge*, 11 Ohio, 223; *Worley v. Tuggle*, 4 Bush, 168; *Smith v. Jordan*, 13 Minn. 264; *Sparks v. Pittman*, 51 Miss. 511; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290; *Oliver v. Mutual C. M. Ins. Co.* 2 Curt. C. C. 277. As illustrative of the various question which may arise, see 3 Pom. Eq. Jur. 414; *Clayton v. Freet*, 10 Ohio St. 544; *Deford v. Mercer*, 24 Iowa, 118 (quitclaim); *Mattingly v. Speak*, 4 Bush, 316; *Lestrade v. Barth*, 19 Cal. 660; *Brown v. Balen*, 33 N. J. Eq. 469; *Weston v. Wilson*, 31 N. J. Eq. 51; *Day v. Day*, 84 N. C. 408; *Sawyer v. Hanson*, 48 Wis. 611; *Kilmer v. Smith*, 77 N. Y. 226; *Jackson v. Andrews*, 59 N. Y. 244; *Bush v. Hicks*, 60 N. Y. 298; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Crippen v. Baumes*, 15 Hun, 136; *Johnson v. Johnson*, 8 Baxt. 261; *Blackburn v. Randolph*, 33 Ark. 119; *Michel v. Tinsley*, 69 Mo. 442; *Baker v. Massey*, 50 Iowa, 399; *Ballentine v. Clark*, 38 Mich. 395; *Pasman v. Montague*,

30 N. J. Eq. 385; *Fly v. Brooks*, 64 Ind. 50; *Nicholson v. Caress*, 59 Ind. 39; *Gerald v. Elley*, 45 Iowa, 322; *Parish v. Scott*, 10 Heisk. 438; *Dart v. Barbour*, 32 Mich. 267; *Cummings v. Freer*, 26 Mich. 128; *Burr v. Hutchinson*, 61 Me. 514; *Huss v. Morris*, 63 Pa. 367; *Blakeman v. Blakeman*, 39 Conn. 320. There is a class of cases where as in a sale or conveyance there is a mistake as to the quality or subject matter of the thing contracted for or where by accident or mistake the agreement is materially variant from what the parties intended, in which cases courts of equity will relieve against it. Cited in *Troy Iron & N. Factory v. Corning*, 45 Barb. 255. See *Marvin v. Bennett*, 8 Paige, 312, 4 L. ed. 441, 26 Wend. 169; *Calverly v. Williams*, 1 Ves. Jr. 210.

**i. Mistake Shown by Parol Proof.**—The mistake may be shown by parol proof and relief granted to the injured party whether he sets up the mistake affirmatively by bill or as a defense. Cited in *Rosevelt v. Dale*, 2 Cow. 133; *Walden v. Skinner*, 101 U. S. 585, 25 L. ed. 966; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 89, 25 L. ed. 54; *Hutcheon v. Johnson*, 33 Barb. 398; *Rider v. Powell*, 4 Abb. App. Dec. 66; *Avery v. Chappel*, 6 Conn. 274, 16 Am. Dec. 56; *Fishell v. Bell*, 1 Clarke Ch. 38, 7 L. ed. 45; *Reading v. Weston*, 8 Conn. 122, 20 Am. Dec. 99; *Smith v. Jordan*, 13 Minn. 269; *McCurdy v. Breathitt*, 5 T. B. Mon. 233, 17 Am. Dec. 66; 2 Pom. Eq. Jur. 330. Limited in *Elder v. Elder*, 10 Me. 86, 25 Am. Dec. 208. Explained in *Worley v. Tuggle*, 4 Bush, 194. See *Nelson v. Carrington*, 4 Munf. 352; *Dale v. Roosevelt*, 5 Johns. Ch. 175, 1 L. ed. 1048; *Lyon v. Richmond*, 2 Johns. Ch. 51, 1 L. ed. 292; *Seymour v. Delancey*, 6 Johns. Ch. 225, 2 L. ed. 108; *Howes v. Barker*, 3 Johns. 506; *Rosevelt v. Dale*, 2 Cow. 133; *Meads v. Lansingh*, Hopk. Ch. 134, 2 L. ed. 369; *Wiser v. Blachly*, 1 Johns. Ch. 607, 1 L. ed. 263; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795; *Barlow v. Scott*, 24 N. Y. 40; *Getman v. Beardsley*, 2 Johns. Ch. 274, 1 L. ed. 376; *Lyman v. United States Ins. Co.* 2 Johns. Ch. 630, 1 L. ed. 519; *Jarvis v. Palmer*, 11 Paige, 658, 5 L. ed. 269; *Henkle v. Royal Exch. Assur. Co.* 1 Ves. Jr. 317; *Bradford v. Union Bank of Tennessee*, 54 U. S. 13 How. 57, 14 L. ed. 49; *Burdett v. Simms*, 3 J. J. Marsh. 190; Story, Eq. Jur. § 168; *Moses v. Murgatroyd*, 1 Johns. Ch. 128, 1 L. ed. 86; *Marks v. Pell*, 1 Johns. Ch. 594, 1 L. ed. 258; *Noble v. Comstock*, 3 Conn. 295; *Liggett v. Ashley*, 5 Litt. 178. Parol evidence is permissible

to prove the mistake although it is denied in the answer. Cited in *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 658. A party may be permitted to show by parol proof a mistake as well as fraud in the execution of a deed or other writing. Cited in *Lyman v. United Ins. Co.* 17 Johns. 376. Parol evidence though confessedly inadmissible at law would be admissible in equity as a defense against the performance asked for. Cited in *Jewett v. Miller*, 10 N. Y. 407. See *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Hileman v. Wright*, 9 Ind. 126; *Davidson v. Greer*, 3 Sneed, 384; *Lumbert v. Hill*, 41 Me. 475; *Adams v. Stevens*, 49 Me. 366.

**j. Burden of Proof.**—The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy the writing will be held to express correctly the intention of the parties. Cited in *Northwestern Mut. L. Ins. Co. v. Nelson*, 103 U. S. 549, 26 L. ed. 438. See *Shelburne v. Inchiquin*, 1 Bro. Ch. 338, 341; *Henkle v. Royal Exch. Assur. Co.* 1 Ves. Jr. 317; *Townshend v. Stangroom*, 6 Ves. Jr. 328, 338; *Lyman v. United Ins. Co.* 2 Johns. Ch. 630, 1 L. ed. 519; *Graves v. Boston M. Ins. Co.* 6 U. S. 2 Cranch, 444, 2 L. ed. 332.

**k. Evidence to Show Mistake Must be Clear and Strong.**—Chancery forbids relief where the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or to opposing presumptions. Applied *Hoover v. Reilly*, 2 Abb. U. S. 475. See *Lyman v. United Ins. Co.* 2 Johns. Ch. 630, 1 L. ed. 519. It must be a case that leaves no reasonable doubt in the mind of the court especially where considerable time had elapsed and the parties to the original transaction have died before application is made for relief. Cited in *Stiles v. Willis*, 6 Cent. Rep. 489, 66 Md. 552; *Pennell v. Wilson*, 2 Robt. 509. See *Watkins v. Stockett*, 6 Harr. & J. 435; *Showman v. Miller*, 6 Md. 485. Chancery will afford relief only when the mistake is properly established by the evidence. Cited in *Gooding v. McAlister*, 9 How. Pr. 129; *Humphreys v. Hurtt*, 20 Hun, 400. It is unsafe to change the character of an instrument by evidence slight and unsatisfactory. Cited in *Taylor v. Baldwin*, 10 Barb. 585. See *Steere v. Steere*, 5 Johns. Ch. 1, 1 L. ed. 987. Where a contract is sought to be avoided on the ground of surprise or mistake, the fact of such



surprise or mistake must be either conceded or so clearly established as to be substantially without dispute. Cited in *Masterton v. Deers*, 1 Sweeney, 418; *Veuzie v. Williams*, 49 U. S. 8 How. 157, 12 L. ed. 1028; *Lyman v. United Ins. Co.* 2 Johns. Ch. 632, 1 L. ed. 520; *McDonnell v. Milholland*, 48 Md. 545; *Pennell v. Wilson*, 2 Abb. N. S. 466; *Adair v. Adair*, 38 Ga. 49; *Arnold v. Fowler*, 44 Ala. 168.

1. **Relief from Mistake in Conveyance.**—Equity has jurisdiction to correct deeds for fraud or mistake in them. Cited in *Loss v. Obry*, 22 N. J. Eq. 55. See *De Riemer v. De Cantillon*, 4 Johns. Ch. 85, 1 L. ed. 772. The fact that the defendant denies that there is a mistake and testifies that the deed was drawn according to the intention of the parties will not prevent the court from granting the relief if it is satisfied that the deed is not in accordance with the agreement, but ought to be so. Cited in *Stines v. Hays*, 36 N. J. Eq. 369. See 1 Story, Eq. Jur. §§ 156, 157. The law requires strong proof to support a real charge of mistake in a deed. Cited in *Shepard v. Shepard*, 36 Mich. 179; *Mauzy v. Sellars*, 26 Gratt. 646. Where no statutory enactment intervenes it is competent for a court of equity to rectify a deed or written contract. Cited in *Place v. Johnson*, 20 Minn. 229. See *De Peyster v. Hasbrouck*, 11 N. Y. 582. Complainant would be entitled to relief from the effect of an omission of an essential part of the agreement from the conveyance. Cited in *Rider v. Powell*, 28 N. Y. 313, 4 Abb. App. Dec. 66. Where an attorney in drawing a deed by which a father conveys a life estate to his daughter neglects to insert "for her sole and separate benefit" it constitutes such a mistake as a court of equity will relieve against. Similar relief may be granted after a lapse of a long period. Approved in *Stone v. Hale*, 17 Ala. 557, 52 Am. Dec. 187. The acknowledgment of a deed can only be impeached for fraud, and the evidence must be clear and convincing. Cited in *Smith v. Allis*, 52 Wis. 337. See *Shelburne v. Inchiquin*, 1 Bro. Ch. 338; *Henkle v. Royal Exch. Assur. Co.* 1 Ves. Sr. 317; *Townshend v. Stangroom*, 6 Ves. Jr. 332; *Lyman v. United Ins. Co.* 2 Johns. Ch. 630, 1 L. ed. 519; *Graves v. Boston M. Ins. Co.* 6 U. S. 2 Cranch, 444, 2 L. ed. 332; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Russell v. Baptist Theo. Union*, 73 Ill. 337. The unsupported testimony of the wife alone is not sufficient to contradict the certificate of acknowledgment of a note and mortgage

made by husband and wife. Applied in *Smith v. Allis*, 52 Wis. 347. To prove an account presented by the defendants to the court of probate in which they charge the sale of land at \$2,800. Evidence of the actual consideration paid could not be received on the foundation of mistake. Cited in *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 668. See *Thompson v. Leake*, 1 Madd. 40; *Phillips v. Thompson*, 1 Johns. Ch. 138, 1 L. ed. 91; *Marks v. Pell*, 1 Johns. Ch. 594, 1 L. ed. 258; *Wiser v. Blachly*, 1 Johns. Ch. 609, 1 L. ed. 264; *Washburn v. Merrills*, 1 Day, 139; *M'Call v. M'Call*, 3 Day, 402; *Noble v. Comstock*, 3 Conn. 295; *Maigley v. Hauer*, 7 Johns. 341.

m. **Enforcement of Corrected Agreement.**—The agreement, when corrected and made to speak the real sense of the parties ought to be enforced as well as any other agreement perfect in the first instance. Cited in *Wood v. Hubbell*, 5 Barb. 603; 2 Pom. Eq. Jur. 330. See *Bellows v. Stone*, 14 N. H. 175; *Smith v. Greeley*, 14 N. H. 378; *Tilton v. Tilton*, 9 N. H. 385; *Craig v. Kittredge*, 23 N. H. 231; *Beardsley v. Knight*, 10 Vt. 185; *Glass v. Hulbert*, 102 Mass. 24, 41; *Metcalf v. Putnam*, 9 Allen, 97; *Quinn v. Roath*, 37 Conn. 16; *Wooden v. Haviland*, 18 Conn. 101; *Chamberlain v. Thompson*, 10 Conn. 243; *Lyman v. United Ins. Co.* 17 Johns. 373; *Rosevelt v. Fulton*, 2 Cow. 129; *Gates v. Green*, 4 Paige, 355, 3 L. ed. 468. The Statute of Frauds is not a bar to an action to compel a specific performance of an oral agreement where the vendee was induced by fraudulent representations to accept a conveyance not including all the lands orally agreed to be conveyed. Cited in *Beardsley v. Duntley*, 69 N. Y. 584. See *Wiswall v. Hall*, 3 Paige, 313, 3 L. ed. 168. A fraudulent possessor is never allowed for beneficial improvements. Cited in *Van Horne v. Fowla*, 5 Johns. Ch. 416, 1 L. ed. 127. The absence of willful fraud on the part of the vendor will not relieve the purchaser from the injury his mistake has entailed upon others. For his own positive acts which mislead and injure he is liable. Cited in *McCall v. Davis*, 56 Pa. 435. See *Tyson v. Passmore*, 2 Pa. 124; *Fisher v. Worrall*, 5 Watts & S. 479; *Jenks v. Fritz*, 7 Watts & S. 201; *Livingston v. Peru Iron Co.* 2 Paige, 390, 2 L. ed. 956; *Quick v. Stuyvesant*, 2 Paige, 92, 2 L. ed. 826.

§ 182. **Intention Cannot be Proved by Parol.**—An intended contract not made cannot be set up in place of one made. *Sanford v. Howard*, 29 Ala. 684.

Parol evidence is not admissible to effect a written contract in which the parties have plainly expressed their intention. *Ames v. Brooks*, 3 New Eng. Rep. 485, 143 Mass. 344.

It is error to admit oral testimony of the intentions with which a writing is executed. *Morris v. Robinson*, 80 Ala. 291; *Watson v. Watson*, 24 S. C. 229.

A contract made in the name of the principal, and signed in his name by another as his agent, cannot be shown by parol to have been signed by the agent with the intention to bind himself. *Heffron v. Pollard*, 73 Tex. 96.

It is admissible to show that a written contract with a certain person who is named as "agent" was intended to be a contract with his wife, for whom he was acting as agent, and not with him personally. *Reab v. Pool*, 30 S. C. 140.

Parol evidence as to what was intended by a bill of sale, or what was included in it, is inadmissible to contradict or add to the writing. *Schroeder v. Schmidt*, 74 Cal. 459.

Or that the parties intended a sale at the market price at the time payment should be demanded. *Marks v. Cass County M. & E. Co.* 43 Iowa, 146.

Or to show that the parties intended their interests should be different from those in partnership articles. *Taft v. Schwamb*, 80 Ill. 289.

Or to prove that an ordinary note by a husband and wife was intended to be a charge upon her separate estate. *Ragsdale v. Gossett*, 2 Lea, 729.

To show that corporate officers who are bound as makers did not intend to make themselves personally liable. *McCandless v. Belle Plain Canning Co.* 4 L. R. A. 396, 78 Iowa, 161.

Parol evidence is not admissible to show that a reservation plainly expressed in a deed was not intended. *Lear v. Durgin*, 6 New Eng. Rep. 896, 64 N. H. 618.

Or an intention to postpone the operations of a deed. *Omaha & G. Smelt. & Ref. Co. v. Tabor*, 5 L. R. A. 226, 13 Colo. 41.

Or to show that a deed delivered to a grantee was intended to operate as an escrow and not as a deed. *Hargrave v. Melbourne*, 86 Ala. 270.

Or to show that a chattel mortgage was intended to embrace property not specifically included therein. *Van Evera v. Davis*, 51 Iowa, 637.

Intention cannot be proved except in cases of ambiguity. *McClelland v. James*, 33 Iowa, 571.

§ 183. **Parol Evidence to Show a Condition Precedent.**—In harmony with well recognized principles of law is the admission of parol evidence to show the non-performance of a condition precedent and this too where the agreement of the parties has assumed a written form. *Pyn v. Campbell*, 6 El. & Bl. 370; *Wallis v. Littell*, 11 C. B. N. S. 368; *Wilson v. Powers*, 131 Mass. 539; *Seymour v. Cowing*, 4 Abb. App. Dec. 200; *Benton v. Martin*, 52 N. Y. 570; *Juillard v. Chaffee*, 92 N. Y. 535, and cases cited. See also Mem. in opinion *Reynolds v. Robinson*, 110 N. Y. 654. It is perhaps needless to say that such a defense is subject to suspicion, and that the rule stated should be cautiously applied to avoid mistake or imposition and strictly confined to cases clearly within its reason. *Ibid.* Parol testimony is admissible to show that an assignment in writing of a bond and mortgage was intended only to secure the assignee from the payment of a debt then in suit, which might subsequently become a lien upon a tract of land purchased by the assignee from the assignor; such testimony being allowed to explain the intent of the contracting parties not to vary, alter or contradict the terms of their written agreement. *Fullwood v. Blanding*, 26 S. C. 312. And where the contract between the parties, as shown by their correspondence, does not specify the commission or rate of compensation to be paid to the agent, oral evidence of an antecedent agreement as to that matter may be admitted, but this principle cannot be extended to the admission of oral evidence as to an agreement for the insertion of restrictions, or special stipulation in a deed outside of the written provisions customary in a warranty deed. *Sayre v. Wilson*, 86 Ala. 151. And when a contract in writing is uncertain in its terms, parol testimony of a subsequent agreement by and between the same contracting parties, making such contract definite, certain and plain, is admissible. *Katz v. Bedford*, 1 L. R. A. 826, 77 Cal. 319. Parol testimony cannot add to an imperfect contract a material part in order to sustain it or make it valid; but it can apply a description in it to the subject of the contract. *Watson v. Baker*, 71 Tex. 739.

In fact it has been decided that parol or extrinsic proof is always admissible and competent to identify the subject matter of a contract if necessary; and this in no way violates the rule

that oral proof is inadmissible to vary or contradict the terms of a written contract. *Bulkley v. Devine*, 3 L. R. A. 330, 127 Ill. 407.

So it may be shown that the instrument sued upon was not to take effect as an agreement until it was approved by some particular person, and that such approval has not been given (*Pym v. Campbell*, 6 El. & Bl. 370); or it may be shown that the instrument was not to be obligatory on the party sued until another person signed it above his signature. *Ely v. Kilborn*, 5 Denio, 512. The facts surrounding the transaction however may be such as to estop the party from introducing such a defense. *Dair v. United States*, 83 U. S. 16 Wall. 1, 21 L. ed. 491.

### § 184. Parol Evidence to Prove a Warranty.

a. **A Cardinal Principle Stated.**—A cardinal principle of the law of sales requires that the bulk purchased shall correspond in quality, grade, etc., with the sample shown in all cases where the sale is by sample there is an implied warranty in such cases and evidence is competent to show any features of the transaction that can legitimately impress the features of a warranty upon the vendor. *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264, 265, 266; *Bradford v. Manly*, 13 Mass. 138, 7 Am. Dec. 122. 123, with note, 125; *Williams v. Spafford*, 8 Pick. 250; *Day v. Raguet*, 14 Minn. 273; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Hanson v. Busse*, 45 Ill. 496. But compare *Boyd v. Wilson*, 83 Pa. 319, 24 Am. Rep. 176; *West Republic Min. Co. v. Jones*, 108 Pa. 55, 65. See *Parker v. Palmer*, 4 Barn. & Ald. 387; Bennett's Benj. Sales, § 648; *Parkinson v. Lee*, 2 East, 314; referring also to *Azémar v. Casella*, L. R. 2 C. P. 446; and consult also Campb. Sales, 305; *Gunther v. Atwell*, 19 Md. 157.

b. **Sale of Merchandise by Sample.**—The commercial activities of modern life imperatively require that in all cases of sale of merchandise by sample the agreement shall be impressed with the characteristics of warranty, and that parol evidence is admissible to show the precise nature and extent of that warranty. We say this is generally held and yet as will be seen, not without dissent. That a sale by sample implies a warranty that the bulk is equal to the sample was held in the United States Supreme Court in *Schuchardt v. Allens*, 68 U. S. 1 Wall. 359, 370, 17 L. ed. 642, 646, and was decided or taken for granted in the following cases: *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed.

987; *Hubbard v. George*, 49 Ill. 275; *Webster v. Granger*, 78 Ill. 230; *Gill v. Kaufman*, 16 Kan. 571; *Gunther v. Atwell*, 19 Md. 157; *Boothby v. Plaisted*, 51 N. H. 436; *Bantley v. Thomas*, 22 Tex. 270; *Whittaker v. Hueske*, 29 Tex. 355; *Bradford v. Manly*, 13 Mass. 139; *Williams v. Spafford*, 8 Pick. 250; *Whitmore v. South Boston Iron Co.* 2 Allen, 52, 58; *Waring v. Mason*, 18 Wend. 425; *Moses v. Mead*, 1 Denio, 378, 386; *Beirne v. Dord*, 5 N. Y. 95, 99; *Leonard v. Fowler*, 44 N. Y. 289; *Hughes v. Bray*, 60 Cal. 284; *Graff v. Foster*, 67 Mo. 512, 521.

In Pennsylvania there is no implied warranty that goods sold by sample are equal to the sample in quality; the maxim of *caveat emptor* applies in all its rigor. See *Boyd v. Wilson*, 83 Pa. 319. This State retains the full array of early decisions on this subject, and is conspicuously at variance with nearly every other jurisdiction in this country.

A warranty may relate to the quality or condition of the article sold or its character. There is no distinction in principle between representations as to quality, condition or character, and what will amount to a warranty in one case will in another. *Hawkins v. Pemberton*, 51 N. Y. 198; *Dounce v. Dow*, 64 N. Y. 411; *White v. Miller*, 71 N. Y. 118; *Van Wyck v. Allen*, 69 N. Y. 61.

**c. Distinction in Older Cases not Tenable.**—The distinctions made in some of the older cases are no longer tenable. They were based mainly upon the authority of *Chandelor v. Lopus*, Cro. Jac. 4, and that case has been distinctly overruled in England. *Seixas v. Woods*, 2 Cai. 48, is tainted with the infirmities of the former case and *Chancellor Kent*, who took part in citing it intimates in his commentaries a doubt of its correctness, 2 Kent, 479.

**d. Rules Governing Contracts of Warranty.**—Contracts of warranty are governed by the same rules of law that apply to all other contracts, and therefore a warranty need not be expressed in any particular form of language. If the vendor, at the time of the sale affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation, that is an express warranty. *Polhemus v. Heiman*, 45 Cal. 573; *Murray v. Smith*, 4 Daly, 277; *Callanan v. Brown*, 31 Iowa, 333; *Thorne v. McVeagh*, 75 Ill. 81; *Bryant v. Crosby*, 40 Me. 9; *Carley v. Wilkins*, 6 Barb. 557; *Oneida Mfg. Soc. v. Lawrence*, 4 Cow. 440. The word "warranty" need not be used

in order to constitute a contract of warranty. *Chapman v. Murch*, 19 Johns. 290; *Roberts v. Morgan*, 2 Cow. 438; *Whitney v. Sutton*, 10 Wend. 411.

It is certainly a regrettable incident that perfect uniformity cannot prevail in a matter of this importance. The New York Court of Appeals distinctly announced the prevailing doctrine in a comparatively recent case (*Hawkins v. Pemberton*, 51 N. Y. 198) and with great particularity repudiated *Chandelor v. Lopus*, Cro. Jac. 4, declaring that it was without weight of authority either in this country or in England—the doctrine has long since been exploded—see Hilliard on Sales, 237, *note*; 2 Kent, Com. (Comstocks ed.) 633, *note a*; *Marriot v. Hampton*, 2 Smith, Lead. Cases, 5th Am. ed. 238; *Bradford v. Manly*, 13 Mass. 139; *Stone v. Denny*, 4 Met. 151.

**e. Warranty Outside of Agreements Relating to Land.—**

To allow the introduction of parol evidence to prove a warranty which was part of the prior or contemporaneous agreement, and about which the deed or other writing is silent, is certainly a direct contradiction to that elementary and universally recognized rule of law and of reason, that in the absence of fraud or mistake parol evidence cannot be received to contradict or vary the terms of a written contract. For it is the plain and recognized doctrine, and may be said to be an elementary principle, that, upon the execution, delivery and acceptance of a deed or written instrument, all prior or contemporaneous parol stipulations or understandings as to warranty, or incidents in any way relating to the subject matter are merged in the deed or writing, and cannot be contradicted or varied by parol. Mr. Wharton after stating similar principles says,—and cites a multitude of cases in support thereof—that, “to deeds the rules just expressed are eminently applicable for the reason that the more solemn are the formalities prescribed by a dispositive document, and the more permanent are meant to be the disposition it makes, the more unjust is its variation by an agency so liable to careless or fraudulent falsification as is unwritten speech. Hence it is that the courts are uniform in their refusal to admit, except in case of fraud or gross concurrent mistake, parol evidence to contradict or vary the terms of a deed as between the parties. . . . To deeds also is the rule applied, that to what is written no new ingredients can be added by parol. In applying this doctrine it has been held that a limited

warranty in a deed cannot be extended to a general warranty by proof of a parol agreement to that effect, made at the time of the delivery of the deed. *Raymond v. Raymond*, 10 Cush. 134; *Dutton v. Gerrish*, 9 Cush. 89. Parol evidence of a verbal warranty of the quantity of land conveyed by deed is inadmissible, as tending to vary and contradict the terms of the instrument. *Cook v. Combs*, 39 N. H. 592, 75 Am. Dec. 241, and *note*, 242; *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *Cabot v. Christie*, 45 Vt. 121, 1 Am. Rep. 313; where it is said that a deed purports to contain all the covenants of the grantor with respect to the land conveyed, and that to add a new covenant by parol would be a palpable violation of the rule that written instruments are not to be varied by parol or oral testimony. So where the deed is absolute in form, a verbal warranty in the nature of a condition made prior to its execution cannot be ingrafted upon the deed by parol evidence. *Marshall County H. S. Co. v. Iowa Evangelical Synod*, 28 Iowa, 360; *Bryan v. Swain*, 56 Cal. 616.

So the covenant implied by the acceptance of a deed expressly warranting against all claims except certain taxes cannot be defeated by oral evidence of a verbal contemporaneous agreement to pay such taxes. *McLeod v. Skiles*, 81 Mo. 595.

**f. An Elementary Rule of Law.**—It is elementary law that upon the execution, delivery and acceptance of a deed or written instrument all prior contemporaneous parol stipulations are merged in the deed or writing, and cannot afterward be set up to contradict or vary the same. It is scarcely necessary to refer to elementary authority or adjudged cases to establish so plain and recognized a doctrine as this. *Robins v. Ayres*, 10 Mo. 538, and 2 Whart. Ev. §§ 920, 921, are amply sufficient for this purpose.

These citations sufficiently indicate the present attitude of the courts upon the subject under review. We gather from them that where the vendor of real estate during some preliminary negotiation touching its sale, and where as a result of such negotiations a sale is perfected and a conveyance issues which does not express in its recitals the parol warranty which had been agreed upon, evidence of any conversation tending to show a parol warranty is inadmissible.

To meet the difficulties this situation frequently imposes the courts have resorted to various refinements and distinctions, which while having the direct effect of abrogating or at least suspending



the Statute of Frauds are all couched in phraseology which disclaims any such intention. They admit the parol evidence, not for the purpose of affecting the interpretation of the particular writing which the party is called upon to meet, but for the purpose of enlarging the juridical sphere of action so as to embrace the whole transaction to which the writings belong, and define the rights growing out of the case. *Miller v. Fichthorn*, 31 Pa. 252.

§ 185. **Parol Evidence to Explain Receipts in Full, Bills of Lading, etc.**—"A receipt in full when given with full knowledge of all the circumstances and in the absence of fraud is conclusive." 3 Starkie, Ev. 1296; 3 Phillips, Ev. (4 Am. ed.) 653. This dictum of the English authorities has little influence with our courts at the present day. The cases in which a receipt has been held to be conclusive upon the party giving it will be found to be cases where the claims or accounts were in dispute, and a compromise was agreed upon; or where a receipt was given for unliquidated damages. Such were the cases of *Coon v. Knapp*, 8 N. Y. 402, and *Kellogg v. Richards*, 14 Wend. 116. In such instances the receipts were held to be in the nature of a contract and release and that it could not be varied by parol proof; a receipt furnishes mere prima facie evidence of the facts stated therein and that it may be controverted or explained by parol evidence is too firmly established by authority throughout the country to admit of question or demur. This grows out of the fact that a receipt is not a contract, it is a mere declaration or admission in writing. Where a contract is embodied in a receipt, then, so far as the receipt contains a contract, it cannot be controverted or explained by parol. This, too, without reference to any distinction between a receipt for a specified sum of money or a receipt in full. The same rule applies in each instance; no reason is apparent why it should not. A receipt for a specified sum of money contains a declaration that a certain sum has been paid in full of all claims of a certain kind or of all demands—neither kind of receipt embodied any contract, both furnish only prima facie evidence and are valuable only as both such are equally open to explanation or contradiction. See opinions of *Commissioners* Hunt and Earl in *Ryan v. Ward*, 48 N. Y. 204; also Woods, Pr. Ev. § 24, chap. 2. In harmony with the foregoing it is well settled that a bill of lading or invoice may be explained by parol (*Grosvenor v. Phillips*, 2 Hill, 151; *Hibbert v. Carter*, 1 T. R. 745,

746; *Bank of Rochester v. Jones*, 4 N. Y. 500, 501; *Sweet v. Barney*, 23 N. Y. 335; *Walter v. Ross*, 2 Wash. C. C. 283; and it may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien or a mere agency. *Bailey v. Hudson River R. Co.* 49 N. Y. 70, opinion by Church, *Ch.*

Bills of lading and subscription papers are catalogued with receipts, and parol evidence is properly admitted to explain and contradict them. They are withdrawn from the operation of the rule which excludes parol evidence to vary or contradict the terms of a written instrument, being mere memoranda hastily given, they are by business usage treated as provisional, the same liberty exists as to informal short-hand memoranda. Whart. Ev. § 926. A very recent decision in Iowa confirms the views previously expressed. It was held that as receipts showing a settlement are but prima facie evidence of such settlement they may be contradicted by parol testimony. *Thompson v. Maxwell*, 74 Iowa, 415.

§ 186. **Parol Evidence of Antecedent Contemporaneous and Subsequent Agreements.**—As a general rule extrinsic evidence by way of parol testimony is not admissible, either to add to, subtract from or contradict or in any way vary the terms of a written contract; all antecedent or contemporaneous negotiations or agreements are merged into the written agreement. *Stoddard v. Nelson*, 17 Or. 417. In an action to recover back money paid on a transfer, and assignment of land interests, evidence by a written instrument which merely states that the assignor transfers his "right, title and interest to the land recently contracted for," and that the assignees assume all liabilities, parol testimony cannot be received as to a promise or agreement by the assignor antecedent to the execution of the written assignment, or contemporaneous therewith, to refund the money if the assignees failed to acquire a deed to the land. *Griel v. Lomax*, 86 Ala. 132. But collateral agreements while inadmissible to vary a written contract may be proved for the purpose of showing that the contract never had a legal existence. *Brewer v. Reel*, 74 Iowa, 506.

And so parol testimony is admissible to show that a writing which is in form a complete contract was not to become binding until the performance of some condition precedent resting on parol; but this rule should be very cautiously applied. *Reynolds v. Robinson*, 110 N. Y. 654. And parol testimony is admissible

to show that an assignment in writing of a bond and mortgage was intended only to secure the assignee from the payment of a debt then in suit, which might subsequently become a lien upon a tract of land purchased by the assignee from the assignor; such testimony being allowed to explain the intent of the contracting parties not to vary, alter or contradict the terms of their written agreement. *Fullwood v. Blanding*, 26 S. C. 312. And where the contract between the parties, as shown by their correspondence, does not specify the commissions or rate of compensation to be paid to the agent, oral evidence of an antecedent agreement as to that matter may be admitted; but this principle cannot be extended to the admission of oral evidence as to an agreement for the insertion of restrictions, or special stipulations in a deed outside of the written provisions, customary in a warranty deed. *Sayre v. Wilson*, 86 Ala. 151.

When a contract in writing is uncertain in its terms, parol testimony of a subsequent agreement by and between the same contracting parties making such contract, definite, certain and plain, is admissible. *Katz v. Bedford*, 77 Cal. 319.

Parol evidence has been received to show a contemporaneous but distinct contract on the same general subject matter (*Duparquet v. Knubel*, 24 Hun, 653, 654; *Lewis v. Seabury*, 74 N. Y. 409; *Chapin v. Dobson*, 78 N. Y. 74; *Unger v. Jacobs*, 7 Hun, 220); as for example, an agreement by the payee of a note given for a sewing machine to furnish the maker work within a certain time, at a certain price. *Weeks v. Medler*, 20 Kan. 57.

While it is generally true that all prior and contemporaneous negotiations are merged in the written agreement of the parties, and parol evidence could not be received of such negotiations to vary, contradict or alter the terms of the written agreement to ingraft a new condition, it must be remembered that there is another rule equally important which allows a collateral agreement made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting the terms, to be given in evidence. *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Exch. 69; *Johnson v. Oppenheim*, 55 N. Y. 280.

It is quite unnecessary to remark that where on a consideration independent of a written instrument a certain thing is to be done or omitted, parol evidence of such contemporaneous or antecedent agreement is admissible. *Lewis v. Seabury*, 74 N. Y. 409.

**§ 187. Function of Courts of Equity in Cases of Mistake.—**

Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments. Where the mistake is admitted by the other party, relief, as all agree, will be granted, and if it be fully proved by other evidence, *Judge Story* says, the reasons for granting relief seem to be equally satisfactory. 1 *Story, Eq. Jur.* (9th ed.) § 156. This principle received a vigorous application in a recent case before the United States Supreme Court in which *Mr. Justice Clifford* elaborates the reasoning involved in such contentions in language which we reproduce as affording the most instructive review of the subject the decisions anywhere contain.

“Rules of decision in suits for specific performance are necessarily affected by considerations peculiar to the nature of the right sought to be enforced and the remedy employed to accomplish the object. Where no question of fraud or mistake is involved, the rule with respect to the admission of parol evidence to vary a written contract is the same in courts of equity as in those of common law; the rule in both being that when an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations. Proof of fraud or mistake, however, may be admitted in equity to show that the terms of the instrument employed in the preparation of the same were varied or made different by addition or subtraction from what they were intended and believed to be when the same was executed.

“Evidence of fraud or mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose, the aggrieved party would have as little hope of redress in a court of equity as in a court of law. Even at law, all that pertains to the execution of a written instrument or to the proof that the instrument was adopted or ratified by the parties as their act or contract, is necessarily left to extrinsic evidence, and witnesses may, consequently, be called for the purpose of impeaching the execution of a deed or other writing under seal, and showing that its sealing or delivery was pro-

cured by fraudulently substituting one instrument for another, or by any other species of fraud by which the complaining party was misled and induced to put his name to that which was substantially different from the actual agreement. *Thoroughgood's Case*, 2 Coke, 5.

"When the deed or other written instrument is duly executed and delivered, the courts of law hold that it contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol, but courts of equity, says *Chancellor Kent*, have a broader jurisdiction and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. Pursuant to that rule, he held it to be established that relief can be had against any deed or contract in writing founded on mistake or fraud, and that mistake may be shown by parol proof and the relief granted to the injured party whether he sets up the mistake affirmatively by bill or as a defense. *Gillespie v. Moon*, 2 Johns. Ch. 585, 596, 1 L. ed. 500.

"Parol proof, said the same learned magistrate, is admissible in equity to correct a mistake in a written contract in favor of the complainant seeking a specific performance, especially where the contract in the first instance is imperfect without referring to extrinsic facts. *Keisselbrack v. Livingston*, 4 Johns. Ch. 144, 1 L. ed. 795; *Cathcart v. Robinson*, 30 U. S. 5 Pet. 264, 8 L. ed. 120.

"Many cases support that proposition without qualification, and all or nearly all agree that it is correct where it is invoked as defense to a suit to enforce specific performance. Little or no disagreement is found in the adjudged cases to that extent, but there are many others where it is held that the rule is unsound when applied in behalf of a complainant seeking to enforce a specific performance of a contract with variations from the written instrument. Difficulty, it must be admitted, would arise in any attempt to reconcile the decided cases in that regard." *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963.

§ 188. **Collection of Recent Authorities on the Subject.**—There are decisions holding that parol evidence is incompetent to contradict a certificate of acknowledgment. *Kerr v. Russell*, 69 Ill. 666; *Green v. Godfrey*, 44 Me. 25.

The certificate of the Justice of the Peace of the acknowledgment of a deed or mortgage is a judicial act; it is conclusive of the

facts certified to in the absence of fraud or duress. *Hector v. Glasgow*, 79 Pa. 79.

Under a general denial in replevin, defendant may show by parol what was the real agreement between plaintiff and a third person from whom he obtained the property, even if it is different from that contained in the writing. *Spooner v. Cummings*, 151 Mass. 313.

The general rule requires the rejection of parol evidence when its effects would be to cut down or destroy stipulations or undertakings entered into between parties and by them put in writing. All prior and contemporaneous negotiations and oral promises in reference to the same subject are merged in the written contract, and the rights and duties of the parties are to be determined by that instrument. When that has been executed it is then conclusively presumed that it contains the whole engagement of the parties. *Engelhorn v. Reitlinger*, 9 L. R. A. 548, 122 N. Y. 76.

The number of cattle actually shipped under a bill of lading specifying a certain number may be shown by parol evidence. *Chapin v. Chicago, M. & St. P. R. Co.* 79 Iowa, 582.

Parol evidence is admissible to aid in the description of a mining claim. *Carter v. Bacigalupi*, 83 Cal. 187.

Parol evidence is not admissible to show that the capital which partnership articles required to be furnished was nominal only. *Hennessy v. Griggs* (N. D.) 44 N. W. Rep. 1010.

Parol evidence is admissible to impeach the validity of a written instrument. Such evidence is not proper to change the terms of a written agreement, but the circumstances under which its execution is procured may be shown, for the purpose of showing whether the paper ever became a contract or not. That a contract existing must be shown by parol, and the proof of such existence may be attacked by proof that the execution of the document as a nullity, as having been procured by duress, or by fraud, etc. *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 352.

Parol evidence is admissible to prove the performance of the necessary acts to constitute a valid attachment, where the return of the officer states that he attached the property, but fails to set forth the performance of all such acts. *Bruise v. Gates*, 80 Cal. 462. If a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense, he must prove it by clear distinct and irresistible evidence. *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896.

A mere admission, although in writing, of a fact subsequently in issue, may be contradicted or explained by oral testimony. *Bingham v. Bernard*, 36 Minn. 114.

The effect of a deed cannot be controlled by oral evidence. Authorities cited in *Knapp v. Bailey*, 4 New Eng. Rep. 150, 79 Me. 195.

Proof of a contemporaneous parol agreement is inadmissible to alter or contradict a contract in writing. *Miller v. Edgerton*, 38 Kan. 36.

Conditions cannot be engrafted upon written instruments by proof of contemporaneous oral agreements. Authorities cited in *Tucker v. Tucker*, 11 West. Rep. 360, 113 Ind. 272.

Where a written contract is shown, an oral warranty cannot be proved. *Nichols v. Wyman*, 71 Iowa, 160.

A receipt "in full of all demands for damages sustained on a highway" is an agreement in full settlement for damages, and cannot be varied by an inconsistent oral contemporaneous agreement. *Squires v. Amherst*, 5 New Eng. Rep. 148, 145 Mass. 192.

In an action on a promissory note payable unconditionally and on a day certain, oral evidence of a contemporaneous or antecedent agreement postponing the time of payment cannot be received. *Doss v. Peterson*, 82 Ala. 253.

Parol evidence is admissible to show circumstances under which an indorsement was made, and to prove fraud in obtaining signature, etc. Authorities cited in *Johnson v. Glover*, 10 West. Rep. 126, 121 Ill. 283.

Courts of equity will look beyond the terms of a written contract, and consider the whole transaction, and will hear parol evidence, in the investigation of allegations as to matters of fraud which induced or affected the terms of the contract, if the person seeking relief has acted promptly and decidedly upon the discovery of fraud, and has not derived such benefits from the transaction as to prevent the parties from being placed *in statu quo*. *Ibid*.

Where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain what is *per se* unintelligible, such explanation not being inconsistent with the written terms. Authorities cited in *The Wanderer*, 29 Fed. Rep. 260.

Where the word or phrase used in a particular trade or calling has a peculiar meaning, evidence may be heard to explain its use,

but not to contradict or explain away the obligation of the contract. *Seavey v. Shurick*, 9 West. Rep. 250, 110 Ind. 494; authorities cited in *Morningstar v. Cunningham*, 9 West. Rep. 63, 110 Ind. 328.

In case of latent ambiguity, parol evidence is admissible for the purpose of determining its existence or nonexistence and for its removal. Authorities cited in *Decker v. Decker*, 10 West. Rep. 348, 121 Ill. 341.

As between immediate parties, parol evidence is admissible to impeach the consideration of an instrument. Authorities cited in *Farwell v. Ensign*, 10 West. Rep. 564, 60 Mich. 600.

In the absence of fraud, parol testimony is inadmissible to prove total lack of consideration for the conveyance purporting to have been made for a consideration. *Gardner v. Lightfoot*, 71 Iowa, 577.

It is always competent to prove that different names may in fact identify or relate to the same person. Authorities cited in *Rudicel v. State*, 10 West. Rep. 838, 111 Ind. 595.

Parol evidence is admissible to prove the true relation between indorsers on a note. *Martin v. Marshall*, 6 New Eng. Rep. 235, 60 Vt. 321.

Parol evidence is admissible to contradict or explain the recitals of date in a mortgage. *Pascault v. Cochran*, 34 Fed. Rep. 358.

It is competent to show that the date inserted in a deed is not the real date of its delivery. *Moody v. Hamilton*, 22 Fla. 298.

Parol evidence is admissible to contradict the record of the proceedings of the directors of a corporation as to the amount of money found due and ordered to be paid to one of its officers. *St. Louis, F. S. & W. R. Co. v. Tiernan*, 37 Kan. 606.

Where a contract is partly in writing and partly oral, oral testimony is admissible to prove the oral part of the contract. *Nissen v. Genessee Gold Min. Co.* 104 N. C. 309.

Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract though it may vary, change or reform the instrument. *Ferguson v. Rafferty*, 6 L. R. A. 33, 128 Pa. 337.

Extrinsic evidence to determine the intention of parties is not competent where a written contract is clear upon its face. *Baker v. Baird*, 79 Mich. 255.

Where a deed is assailed by a third person on the ground of



fraud, evidence is admissible to show that a substantial and valuable consideration, in addition to the consideration expressed was or was not paid. *Casto v. Fry*, 33 W. Va. 449.

Parol testimony is inadmissible to show that a contract totally at variance with the one sued on was contemporaneously agreed on between the parties. *DeLoach v. Smith*, 83 Ga. 665.

The language of a written contract, while it is in force, is the only legitimate evidence of what the parties intended and understood by it. *West Haven Water Co. v. Redfield*, 58 Conn. 39.

The presumption of law is that the entire contract is contained in the writing, and parol testimony of declarations made by the parties at the time is inadmissible. *Dodge v. Kiene*, 28 Neb. 216.

Where a contract is silent as to the time of performance, the law implies that it is to be performed in a reasonable time; and if it be in writing, evidence of a contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself. *Liljengren Furniture & L. Co. v. Mead*, 42 Minn. 420.

Oral evidence of the surrounding circumstances is admissible to show that a writing sued on does not show all of the contract relations between the parties. *Peabody v. Bement*, 79 Mich. 47.

Parol evidence is admissible to contradict, vary or avoid a written instrument, where it clearly shows that but for the oral stipulations it would not have been executed. *Wanner v. Landis*, 137 Pa. 61.

Parol evidence is inadmissible to show whether a deed which has been delivered shall take effect absolutely or only on condition of the grantor's death. *Mowry v. Heney*, 86 Cal. 471.

Parol evidence is admissible to show the true consideration agreed to be paid for personal property purchased, and that an error as to the price was committed in drawing the bill of sale. *Halpin v. Stone*, 78 Wis. 183.

Parol evidence is admissible that two letters constituting an entire transaction and which together will take the contract out of the Statute of Frauds, were inclosed in an envelope and sent by defendants to plaintiff. *Barney v. Forbes*, 118 N. Y. 580.

The test of the admissibility of evidence dehors a deed is whether it tends to so explain some descriptive word of expression as to show that such phraseology otherwise of doubtful import contains in itself with such explanation an identification of the land conveyed. *Blow v. Vaughan*, 105 N. C. 198.

Guarantees like other contracts must be construed so as to give effect to the intentions of the parties; and if upon their face the intention is doubtful resort may be had to parol evidence of the situation and surroundings of the parties. *Gardner v. Watson*, 76 Tex. 25.

To ascertain the meaning of an ambiguous contract the circumstances under which it was executed and the matters to which it relates may be established by parol evidence. *Barney v. Forbes*, 118 N. Y. 580.

Parol evidence is admissible to show how and when letters forming part of an entire correspondence were received. *Ibid.*

In the interpretation of a contract it is competent to consider such oral testimony as tends to put the court in the position of, and give it the point of view occupied by the parties themselves, when they executed the contract. *Dexter v. Ohlander*, 89 Ala. 262.

A written contract which is free from ambiguity and perfect in itself and not the product of fraud or the result of mistake, and which has not been changed by subsequent contract, cannot be changed, varied or contradicted by parol evidence. *Schenck v. Spring Lake Beach Imp. Co.* 47 N. J. Eq. 44.

Where a contract is in writing and is so distinctly drawn as to leave no ambiguities for parol explanation, evidence of a prior course of dealing between the parties to it—and especially of a prior course of dealing between one of the parties to it and the predecessor of the other party—cannot be appealed to, to supply an interpretation of it. *Conrad v. Fisher*, 8 L. R. A. 147, 37 Mo. App. 352.

It is competent to show that parties in their dealings under a written contract varied its terms by a subsequent parol agreement. *Ibid.*

Where a contract is partly in writing and partly by verbal agreement, parol evidence is admissible to show the portion of the contract not reduced to writing. *Peterson v. Chicago, R. I. & P. R. Co.* 80 Iowa, 92.

In a suit on the written subscription of a stockholder in a corporation, evidence of an oral condition to the subscription is incompetent. *Masonic Temple Asso. v. Channell*, 43 Minn. 353.

Extrinsic evidence is inadmissible to explain or contradict a ballot cast at an election for a justice of the peace in the third district of the City of Lincoln, Nebraska, containing the names of

three persons when but one person was to be elected. *State v. Farnworthy*, 29 Neb. 341.

A person not a party to a written contract cannot, in New Jersey, be shown to be a party by oral evidence. *Schenck v. Spring Lake Beach Imp. Co.* 47 N. J. Eq. 44.

The rule that contemporaneous parol evidence is inadmissible to contradict or vary the terms of a valid written instrument is limited in its application to the language of the instrument, and does not exclude the light of extrinsic circumstances. *Rollins v. Pueblo County Comrs.* 15 Colo. 103.

Where the description in a deed is not clear and intelligible the situation of the parties and the circumstances surrounding the transaction may be considered in connection with its provision to ascertain the intention and give it practical effect. *Wills v. Leverich*, 20 Or. 168.

It is not competent to aver or prove that a note drew only 6 per cent interest where the note expressly fixes the rate of interest at 10 per cent. *Davis v. Stout*, 126 Ind. 12.

Parol evidence of a usage or custom is inadmissible for the purpose of varying the terms or conditions of a written contract when it is free from uncertainty or ambiguity. *Scott v. Hartley*, 126 Ind. 239.

Parol evidence is admissible in an action for broker's commissions, that a receipt and deed deposited in escrow at the time of the alleged sale did not contain the entire agreement of the parties, but that there was a parol condition leaving the vendee at liberty to refuse to buy, and making the transaction a mere option to purchase. *Condit v. Cowdrey*, 123 N. Y. 463.

Parol evidence is admissible to show the reasonable value of services by a real estate broker in buying or selling lands where the compensation to be paid him is not specified in the contract employing him. *Toomy v. Dunphy*, 86 Cal. 639.

A written and express contract cannot be controlled or varied or contradicted by a usage or custom. *De Witt v. Berry*, 134 U. S. 306, 33 L. ed. 896.

When parties have put their engagement into writing in such terms as import a legal obligation, without any uncertainty it is conclusively presumed that the whole engagement was reduced to writing; and all oral testimony of a previous conversation between the parties is inadmissible. *Ibid.*

Where a contract of sale of goods is in writing and contains no

warranty, or where a written contract contains a warranty, parol evidence is not admissible to add a warranty. *Ibid.*

A parol agreement anterior to the execution of a conveyance is ineffectual to modify the latter. *Chaplin v. Baker*, 124 Ind. 385.

Any matter such as fraud or illegality which would affect the validity of a written contract may be proved by parol evidence. *Lewis v. Willoughby*, 43 Minn. 307.

A deed absolute on its face made to the wife of the grantor cannot be shown by parol evidence to have been in trust, in the absence of fraud, accident or mistake. *Gowdy v. Gordon*, 122 Ind. 533.

A letter alleged to contain a blackmailing charge may be explained by parol evidence if it is ambiguous. *Motsinger v. State*, 123 Ind. 498.

## CHAPTER IX.

### EXPERT AND OPINION TESTIMONY.

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§ 189. **Necessity for Created by Specialized Pursuits.**—A diversified industry develops specialized pursuits. These in their turn stimulate exhaustive inquiry and acute scholarship, which has a tendency to give special significance and value to the opinion of those who have signalized their devotion to some particular pursuit by exact study and knowledge of the various outward manifestations and subtle effects which every specialty involves. Hence the peculiar value and importance that justly attaches to the expressions of opinion by parties qualified to give a discriminating and analytical statement of cause or effect, and whose critical knowledge is frequently valued in determining the just relations, equipoise and juxtaposition of natural phenomena in its complicated relations with the affairs of men.

§ 190. **General Rule Restricts a Witness to Evidence of Facts.**—It is familiar learning, emphasized by a very formidable array of authorities, that witnesses must give evidence of facts,—statements, oral or written, of what has actually occurred, and not edify the court and jury by extracts from their opinion. The same case, however, which emphasizes and gives special significance to this familiar rule, also notes and italicizes the exception under it, and *Mr. Justice Harlan* employs unequivocal language in expressing the idea when he says: “The general rule undoubtedly is, that witnesses are restricted to proof of facts within their personal

knowledge and may not express their opinion or judgment as to matters which the jury or the court are required to determine or which must constitute elements in such determination. To this rule there is a well established exception in the case of witness having special knowledge or skill in the business, art or science, the principles of which are involved in the issue to be tried." *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612-624, 28 L. ed. 536-540.

### § 191. Witness Not to Draw Conclusions or Give Opinions.

—"As a rule witnesses must state facts, and not draw conclusions or give opinions. It is the duty of the jury or court, to draw conclusions from the evidence, and form opinions upon the facts proved. The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule and the exceptions are not to be extended or enlarged so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had." *Teerpenning v. Corn Exch. Ins. Co.* 43 N. Y. 279.

These considerations doubtless influenced Sir James Stephen in formulating Article 48, of his Digest of the Law of Evidence, which is in the following language:

§ 192. **The English Rule.**—"The fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter." See *Continental Ins. Co. v. DelPeuch*, 82 Pa. 225; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361; *Clark v. Baird*, 9 N. Y. 183.

The exceptions alluded to in the article above cited will receive the treatment their special significance merits, in subsequent sections of this chapter. Mr. Stephen's succeeding article (§ 49), reaches the very pith and marrow of the subject now under review. The inimitable conciseness of the statement and the extreme lucidity of style make it worthy of reproduction entire. "When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

"Such persons are hereinafter called experts.

"The words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation



of an opinion, and amongst others the examination of handwriting.

“When there is an question as to a foreign law the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.

“It is the duty of the judge to decide, subject to the opinion of the court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.

“The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.”

§ 193. **Its Harmony with American Decisions.**—The language of this section merely chrystalizes a number of adjudications of a similar import, English and American, from which we select the following as illustrative: *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 453; *Jones v. Tucker*, 41 N. H. 546; *Muldowney v. Illinois Cent. R. Co.* 36 Iowa, 462; *Coyle v. Com.* 104 Pa. 117; *Hewlett v. Wood*, 55 N. Y. 634; *Congress & E. S. Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487.

#### § 194. **Necessity for an Accurate Definition of the Term “Expert.”**

a. **Authorities Collected.**—These observations make it necessary to accurately define the term “expert,” and upon this topic, Anderson’s Law Dictionary may be regarded as authority.

A person instructed by experience. *Hyde v. Woolfolk*, 1 Iowa, 166, 167; 2 Best, Ev. 513; *Toomes’ Estate*, 54 Cal. 517.

A skilled or experienced person; a person having skill, experience or peculiar knowledge on certain subjects or in certain professions; a scientific witness. *Heald v. Thing*, 45 Me. 394; *Clark v. Rockland W. P. Co.* 52 Me. 77; *Jones v. Tucker*, 41 N. H. 547; *Dole v. Johnson*, 50 N. H. 454; *State v. Phair*, 48 Vt. 377.

On questions of science, skill, trade or art or others of like kind, a person of skill, sometimes called an expert, may not only testify

to facts, but may give his opinion. His qualification must first be shown to the court. *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487, cases Clifford, J.; 1 Greenl. Ev. § 440.

**b. Qualifications of an Expert, Question for the Court.—**

Whether a witness who is called as an expert has the requisite qualifications to enable him to testify is a preliminary question for the court, the decision of which is conclusive, unless it appears upon the evidence to have been erroneous or to have been founded upon some error in law. *Perkins v. Stickney*, 132 Mass. 218.

The opinions of witnesses are constantly taken as to the result of their observations on a great variety of subjects. All that is required is that the witnesses should be able properly to make the observations, the result of which they give; and the confidence bestowed upon their conclusions will depend upon the extent and completeness of their examination, and the ability with which it is made. *Hopt v. Utah*, 120 U. S. 437, 438, 30 L. ed. 710, 711, cases.

**c. Opinions of, Weight to be Given to.—**The testimony of an expert has not the weight of testimony from observation. His statements are mere opinions, and entitled to such weight only as his experience justifies. *United States v. Pendergast*, 32 Fed. Rep. 198.

Where the subject of a proposed inquiry is not a matter of science but of common observation, upon which the ordinary mind is capable of forming a judgment, an expert may not state his opinion. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 472, 24 L. ed. 258, cases; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 618, 28 L. ed. 538; *Carter v. Boehm*, 3 Burr. 1905, 1 Smith, Lead. Cas. 4th Am. ed. 286, cases.

**d. The Governing Rule.—**These decisions sufficiently indicate the definition, and the governing rule deduced from the cases permitting the opinion of witnesses is, that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it.

**e. A Judicial View of the Subject.—**To the same effect it was said by Judge Earl in *Ferguson v. Hubbell*, 97 N. Y. 507: "Opinions are allowed when . . . the facts cannot be ade-

quately placed before the jury so as to impress their mind as they impress the minds of a competent skilled observer. When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them, and draw inferences from them as witnesses, there is no occasion to resort to expert or opinion evidence." *Van Wycklen v. Brooklyn*, 118 N. Y. 424.

**f. Testimony not to be Unnecessarily Extended.**—The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable and leave the jury to exercise their judgment and experience upon the facts proved.

**g. Discountenanced by High Authority.**—Where witnesses testify to facts they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give the false opinion without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts. As early as 1839 it was said by Lord Campbell in the *Tracy Peerage Case* (10 Clark & F. 154, 191), that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence. "Without indorsing this strong language which is, however, countenanced by the utterances of other judges and of some text-writers, and believing that opinion evidence is in many cases essential in the administration of justice, yet we think it should not be much encouraged and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted." *Ferguson v. Hubbell*, 97 N. Y. 507.

**h. What will Warrant Introduction of.**—It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some

trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them as witnesses, then there is no occasion to resort to expert or opinion evidence. To require the exclusion of such evidence, it is not needed that the jurors should be able to see the facts as they appear to eye-witnesses or to be as capable to draw conclusions from them as some witnesses might be, but it is sufficient that the facts can be presented in such a manner that jurors of ordinary intelligence and experience in the affairs of life can appreciate them, can base intelligent judgments upon them and comprehend them sufficiently for the ordinary administration of justice. *Ferguson v. Hubbell*, 97 N. Y. 507.

i. **Upon Questions Relating to Arts and Sciences.**—It is well settled by authority that the persons who have made special inquiry upon certain topics relating to the arts and sciences, and have given special study and investigation to scientific and artistic affairs, are competent to testify relative to such matter, and give their opinions respecting the same (*Lincoln v. Taunton Copper Mfg. Co.* 9 Allen, 181; *Williams v. Taunton*, 125 Mass. 34; *Shelton v. State*, 34 Tex. 664); and the evidence of a duly qualified physician or surgeon is pertinent in reference to matters within the legitimate scope of his professional employment (*Lush v. McDaniel*, 13 Ired. L. 485; *Hook v. Stovall*, 26 Ga. 704; *Roberts v. Fleming*, 31 Ala. 683; *Jones v. White*, 11 Humph. 268; *State v. Smith*, 32 Me. 369; *Lindsay v. People*, 63 N. Y. 143; *Paty v. Martin*, 15 La. Ann. 620; *Com. v. Piper*, 120 Mass. 185; *Shelton v. State*, 34 Tex. 662; *State v. Morphy*, 33 Iowa, 270); and analogy would seem to suggest that an attorney and counsellor at law was qualified to give an opinion as to the value of professional services rendered. *Allis v. Day*, 14 Minn. 516; *Eggleston v. Boardman*, 37 Mich. 14; *Thompson v. Boyle*, 85 Pa. 477; *Eagle & P. Mfg. Co. v. Browne*, 58 Ga. 240; *Covey v. Campbell*, 52 Ind. 157; *Williams v. Brown*, 28 Ohio St. 547; *Mowry v. Chase*, 100 Mass. 79; *Ottawa University v. Parkinson*, 14 Kan. 159; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983.

**j. Compensation for Services of.**—"Attorneys and solicitors are entitled to have allowed to them for their professional services, what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning, skill and proficiency; and for the purpose of aiding the jury in determining that matter, it is proposed to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same courts. *Vilas v. Downer*, 21 Vt. 419."

*Mr. Justice Clifford's* reasoning in *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983, places a quietus upon further controversy as regards this subject. If it is necessary to furnish a further vindication of the rule announced, it is admirably accomplished by an excerpt from this opinion.

"Professional services, to prepare and advocate just claims for compensation, are as legitimate as services rendered in court in arguing a cause to convince a court or jury that the claim presented or the defense set up against a claim presented by the other party, ought to be allowed or rejected. Parties in such cases require advocates; and the legal profession must have a right to accept such employment and to receive compensation for their services; nor can courts of justice adjudge such contracts illegal, if they are free from any taint of fraud, misrepresentation or unfairness."

**k. A Distinction Noted.**—An important distinction obtrudes itself at this juncture, which must be observed; it is this: The mere opportunity for observing the characteristics of certain phenomena is insufficient to qualify one as an expert, unless that opportunity is supplemented and reinforced by special study and critical attention. A New Hampshire case of comparatively recent date will illustrate this rule. A. has been a practicing attorney for many years, several times his attention has been called to comparison in handwriting; but the subject has never been a matter of special investigation. His opinion is worthless and inadmissible. The courts say: His attention has only once or twice, in the course of a long professional experience as a lawyer, been particularly called to the examination and comparison of handwriting. He was not, with reference to the subject under consideration, a man of science, and he was not qualified by any previous habit, or course of attention, observation and peculiar

and special study in that direction. *Ellingwood v. Bragg*, 52 N. H. 490; *Goldstein v. Black*, 50 Cal. 462.

1. **Decision of New York Court of Appeals.**—Witnesses who are skilled in any science, art or trade, or occupation, may not only testify to facts, but are sometimes permitted to give their opinions as experts. This is permitted because such witnesses are supposed, from their experience and study, to have peculiar knowledge upon the subject of inquiry, which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from facts, and basing opinions on them, than jurors generally are supposed to be; opinions are also allowed in some cases where, from the nature of the matter under investigation, the facts cannot be adequately placed before the jury so as to impress their minds as they impress the mind of a competent skilled observer, and where the facts cannot be stated or described in such language as will enable persons, not eye-witnesses, to form an accurate judgment in regard to them, and no better evidence than such opinion is attainable. *Young v. Johnson*, 123 N. Y. 226.

m. **Rule Approved by Weight of Authority.**—As we have shown, the weight of authority lends its approval to this rule. It is competent to allow expert testimony as to the signature of a document when it is alleged to have been written in a simulated hand, and the question is unaffected by the fact that the experts testifying as to their opinion have had no previous knowledge of the handwriting. *Jackson v. Van Dusen*, 5 Johns. 144; *Doe v. Sackermore*, 5 Ad. & El. 705, opinion, Patterson, J.; *Allesbrook v. Roach*, 1 Esp. 351; *Griffith v. Williams*, 1 Comp. & J. 47; *Doe v. Newton*, 5 Ad. & El. 514; *Griffits v. Ivery*, 11 Ad. & El. 322; *Hughes v. Rogers*, 8 Mees. & W. 123; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Folkes v. Chadd*, 3 Dougl. 157; *Goodtitle v. Braham*, 4 T. Rep. 496; *Rex v. Cator*, 4 Esp. 120; *Reg. v. Williams*, 8 Car. & P. 431; *Cooper v. Bockett*, 4 Moore, P. C. 433; *Doe v. Thomas*, 14 East, 327; *Roe v. Rawlings*, 7 East, 282 n.; *Mudd v. Sackermore*, 5 Ad. & El. 703; *Lyon v. Lyman*, 9 Conn. 55; *Hammond's Case*, 2 Me. 33; *Withee v. Rowe*, 45 Me. 571; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Webster*, 5 Cush. 295; *State v. Hastings*, 53 N. H. 453; *State v. Ward*, 39 Vt. 226; *Hicks v. Person*, 19 Ohio, 426; *Demeritt v. Randall*, 116 Mass. 331; *People v. Hewit*, 2 Park. Crim. Rep. 20; *Rogers v. Shaler*, Anth. N. P.

109; *Phoenix F. Ins. Co. v. Philip*, 13 Wend. 81; *Jackson v. Phillips*, 9 Cow. 112; *Ellis v. People*, 21 How. Pr. 358; *Kowing v. Manly*, 49 N. Y. 203; *Roe v. Roe*, 8 Jones & S. 1.

§ 195. **In Matters of Ordinary Observation, Expert Evidence Incompetent.**—The general rules that support the frame-work and superstructure of the law of evidence are few and simple. The contradiction, the misconception—the hopeless diversity in some instances—arises from the want of a critical apprehension of the exceptions that characterize and accompany all general rules. A graphic illustration of this is afforded by the suggestions that spring from even a cursory review of the subject now under treatment. It is abundantly settled by authority that the general rule with reference to evidence, requires a witness to testify to facts and not conclusions. *Scattergood v. Wood*, 79 N. Y. 263; *Hopkins v. Indianapolis & St. L. R. Co.* 78 Ill. 32; *Seliger v. Bastian*, 66 Wis. 521; *Morris v. East Haven*, 41 Conn. 252. Hence an expert, whatever his attainment or eminence or qualification, is not a competent witness as such to testify regarding the matters which are the subject of ordinary observation or common notoriety, and which fall within the cognizance of every day observation and experience. *Thompson v. Deprez*, 96 Ind. 67; *Dillard v. State*, 58 Miss. 368; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Harvey v. United States*, 18 Ct. Cl. 470; *Mayhew v. Sullivan Min. Co.* 76 Me. 100; *Com. v. Piper*, 120 Mass. 185; *Sledge v. Scott*, 56 Ala. 202; *Rosenheim v. America Ins. Co.* 33 Mo. 230; *Newmark v. Liverpool & L. F. & L. Ins. Co.* 30 Mo. 160; *Connor v. Stanley*, 67 Cal. 315; *McKay v. Overton*, 65 Tex. 82; *Concord R. Co. v. Greeley*, 23 N. H. 237; *Page v. Parker*, 40 N. H. 47; *Bryant v. Central Vermont R. Co.* 56 Vt. 710; *Perkins v. Augusta Ins. & Bkg. Co.* 10 Gray, 312; *Boston & W. R. Co. v. Old Colony & F. R. R. Co.* 3 Allen, 142; *Higgins v. Dewey*, 107 Mass. 494; *Perkins v. Stickney*, 132 Mass. 217; *Franklin F. Ins. Co. v. Gruver*, 100 Pa. 266; *Baltimore Elev. Co. v. Neal*, 65 Md. 438; *Moore v. State*, 17 Ohio St. 521; *Linn v. Sigsbee*, 67 Ill. 75; *Hopkins v. Indianapolis & St. L. R. Co.* 78 Ill. 32; *People v. Sessions*, 58 Mich. 594; *Jones v. State*, 71 Ind. 66; *Pelamourges v. Clark*, 9 Iowa, 1; *Bills v. Ottumwa*, 35 Iowa, 107; *Hughes v. Muscatine Co.* 44 Iowa, 672; *Kline v. Kansas City, St. J. & C. B. R. Co.* 50 Iowa, 656; *Mantel v. Chicago, M. & St. P. R. Co.* 33 Minn. 62; *Schmieder v. Barney*, 113 U. S. 645, 28 L. ed. 1130.

**a. Opinion of Chief Justice Waite.**—The case last cited derives its chief importance in this connection from the fact that it conferred upon *Chief Justice* Waite the opportunity to illustrate the subject matter of this review.

In referring to this exact phase of evidence he said: "The effort was to put the opinion of commercial experts in the place of that of the jury, upon a question which was as well understood by the community at large as by merchants and importers. This, it was decided in *Greenleaf v. Goodrich*, could not be done, and upon the point supposed to have been reserved in that decision, this case stands just where that did. The testimony offered was properly rejected." *Schmieder v. Barney*, 113 U. S. 645, 28 L. ed. 1130.

**b. Of Mr. Justice Strong.**—The case of *Greenleaf v. Goodrich*, cited by the distinguished judge, is a very recent authority. The case was accorded the honor of unanimous affirmance, and the opinion of *Mr. Justice* Strong incorporates the following language: "While it is true that where words of art or phrases are novel or obscure as in terms of art, it was proper to explain them by reference to the art or science to which they were appropriate, the rule was not so, when the words or phrases are familiar to all classes, grades and occupations; and that the popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private transactions." *Greenleaf v. Goodrich*, 101 U. S. 278, 25 L. ed. 845.

**c. Expression of the Rule by Massachusetts Supreme Court.**—The rule is expressed by the Massachusetts Supreme Court in the most logical manner, and as a thorough examination of the authorities fails to give better synopsis of the prevailing theory, with reference to opinions concerning value, I quote the language of that court, "It is not necessary in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify." *Whitney v. Thacher*, 117 Mass. 526.

**d. By Judge Earl.**—By supplementing the opinion of the Massachusetts court by that of *Judge* Earl in the New York



Court of Appeals, we reach a very satisfactory result regarding the degree of knowledge imputed to a witness before he is adjudged competent to give an opinion of values. "No rule of law can be laid down, defining how much acquaintance with property a witness must have to render his opinion of its value competent evidence. He must have some knowledge of it, sufficient to enable him to form an estimate, and it is then for the jury to say, in view of his means of judging, to what weight his estimate is entitled." *Bedell v. Long Island R. Co.* 44 N. Y. 367. The same distinguished judge in an earlier case clothed the same idea in equally concise language. Witnesses may give opinions as to the value of services of which they had peculiar knowledge, which a jury is not supposed to possess. They may base their opinions upon what they know of the services rendered, or upon a hypothetical case, including some or all the facts proven and the jury will determine from the skill of the witnesses and all the other circumstances the weight to be given to the opinions.

"Barley is a well known commodity and has a market price, and one who knows it can testify to it." *Earl, J., in Hamlin v. Sears*, 82 N. Y. 327. Analogous with the above is a decision by the Supreme Court of Mississippi. "In the nature of things the value of this sort of property (an ordinary shot-gun) in such common use, can be estimated by almost every man in the community. It is not like paintings or precious stones, of which experts alone can form intelligent judgment. But it is rather like that class of merchandise and commodities, of the value of which most persons have knowledge." *Cooper v. State*, 53 Miss. 398.

**e. Expert Opinion, Province of the Jury.**—The opinion of commercial experts cannot be put in the place of that of the jury, upon a question which is as well understood by the community at large as by merchants and importers. *Schmieder v. Barney*, 113 U. S. 645, 28 L. ed. 1130.

**f. Real Estate Values, How Proved.**—I may safely affirm, as an indisputable proposition sustained by a great preponderance of authority, that real estate values, in the vast majority of instances may be proved by the opinions of ordinary witnesses, who are acquainted with the real estate in question, or who have an intimate knowledge of real estate similarly situated in its immediate vicinity. *Brown v. Corey*, 43 Pa. 495; *Evansville I. & S. C. L. R. Co. v. Cochran*, 10 Ind. 560; *Sater v. Burlington & M. P.*

*Pl. Road Co.* 1 Iowa, 386; *Jarvis v. Furman*, 25 Hun, 391; *Holton v. Lake County Comrs.* 55 Ind. 194; *Tate v. Missouri K. & T. R. Co.* 64 Mo. 149; *Warren v. Wheeler*, 21 Me. 484; *Carpenter v. Robinson*, 1 Holmes, 73; *French v. Snyder*, 30 Ill. 344; *Shaw v. Charlestown*, 2 Gray, 107; *Watson v. Pittsburgh & C. R. Co.* 37 Pa. 469; *Means v. Means*, 7 Rich. L. 533; *Houston & T. C. R. Co. v. Knapp*, 51 Tex. 592; *Erd v. Chicago & N. W. R. Co.* 41 Wis. 65; *Snow v. Boston & M. R. Co.* 65 Me. 230; *Hosmer v. Warner*, 15 Gray, 46; *Smalley v. Iowa Pac. R. Co.* 36 Iowa, 571; *Rand v. Newton*, 6 Allen, 38; *Thomas v. Mallinckrodt*, 43 Mo. 58; *Thorn v. Sutherland*, 25 Hun, 435; *Bristol County Sav. Bank v. Keavy*, 128 Mass. 298; *Page v. Wells*, 37 Mich. 415; *Pettibone v. Smith*, 37 Mich. 579.

By parity of reasoning the same principles that allow a witness to testify as to the value of real estate, apply *a fortiori* to questions relative to the value of goods and chattels. *Continental Ins. Co. v. Horton*, 28 Mich. 173; *Whitfield v. Whitfield*, 40 Miss. 352; *Tiffany v. Lord*, 65 N. Y. 310; *Laurent v. Vaughn*, 30 Vt. 90; *Watry v. Hiltgen*, 16 Wis. 516; *Merrill v. Grinnell*, 30 N. Y. 595; *Hudson v. State*, 61 Ala. 333; *Burger v. Northern Pac. R. Co.* 22 Minn. 343; *Hood v. Maxwell*, 1 W. Va. 239; *Ward v. Reynolds*, 32 Ala. 384; *Gonzales College v. McHugh*, 21 Tex. 256; *Lawrence v. Boston*, 119 Mass. 126; *Brackett v. Edgerton*, 14 Minn. 174; *Thatcher v. Kaucher*, 2 Colo. 698; *The Sabioncello*, 8 Ben. 90; *Noonan v. Ilsley*, 22 Wis. 27; *Hutchinson v. Brown*, 33 Wis. 465; *Doane v. Garretson*, 24 Iowa, 351; *Mathews v. Stewart*, 44 Mich. 209; *Derby v. Gallup*, 5 Minn. 119.

A farmer living in the neighborhood who has had knowledge for years of a farm through which a right of way is condemned and has known its location, advantages, character of soil and market value compared to other lands surrounding it, is competent to testify as to the value of the land taken and damages to the whole tract. *Chicago K. & W. R. Co. v. Cosper*, 42 Kan. 561.

g. **Value of Animals.**—So the value of animals may be proved by ordinary opinion evidence, and similarly the value of services may be proved, by evidence of opinion. *White v. Thomas*, 39 Ill. 228; *Rawles v. James*, 49 Ala. 183; *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 385; *Anson v. Dwight*, 18 Iowa, 244; *Brill v. Flagler*, 23 Wend. 354; *Ohio & M. R. Co. v. Taylor*, 27 Ill. 207; *Atchison & N. R. Co. v. Harper*, 19 Kan. 529; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165. An action was

brought for breach of warranty, on the sale of a cow, that she was young and good. The opinion of a witness as to what the cow would have been worth if good and young, and what she would have been worth provided she gave four quarts of milk a day, was admitted. *Joy v. Hopkins*, 5 Denio, 84; and see *Whipple v. Walpole*, 10 N. H. 130; *Toledo & W. R. Co. v. Smith*, 25 Ind. 238; *Miller v. Smith*, 112 Mass. 470.

### § 196. Proof of Handwriting.

**a. Its Inherent Weakness as Evidence.**—Of all kinds of evidence admitted in a court this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence. *Cowan v. Beall*, 1 McArth. 271.

Every one knows how unsafe it is to rely upon anyone's opinion concerning the niceties of penmanship. The introduction of professional experts has only added to the mischief instead of palliating it, and the results of litigation have shown that these are often the merest pretenders to knowledge whose notions are pure speculation. Opinions are necessarily received and may be valuable, but at best this kind of testimony is a necessary evil. Those who have had personal acquaintance with the handwriting of a person are not always reliable in their views, and single signatures, apart from some known surroundings, are not always recognized by the one who made them. Every degree of removal beyond personal knowledge into the domain of what is sometimes called with great liberality, scientific opinion, is a step towards greater uncertainty, and the science which is generally diffused is of very moderate value. *Re Foster's Will*, 34 Mich. 21,

The fact that an English statute has allowed the reception of documents satisfactory to the court, is not an argument to which we can yield our own judgment. Some of the ablest judges in England, who were not the least backward in legal reform have always regarded the old rule as over legal than over strict. What influences may have induced Parliament to change the rule we do not know, but it certainly was not the opinion of those judges whose views have been most respected. *Ibid.*

**b. Comparison by Juxtaposition.**—In Illinois, comparison by juxtaposition is not allowable but the individual members of the jury may compare the controverted writing with any document properly in evidence. In other words, the genuineness of a signa-

ture cannot be proved by comparing it to another signature admitted to be genuine. *Kernin v. Hill*, 37 Ill. 209.

**c. Fluctuation of the Rule.**—The New York Rule is clear, concise and well authenticated. For fifty years the matter underwent a state of gestation, and was subjected to various vacillating rules which finally compelled legislative interference, and in 1881 the matter crystallized into statutory form, which is believed to express and typify the ripest conclusions and ablest judicial judgments that have yet been given on this vexed and much controverted subject. We give the substance of the New York Statutes (Laws of 1880, chapter 36), by stating that it permits the comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine. This proof of genuineness therefore is addressed to the consideration of the court only. The evidence on this point is not direct evidence upon the merits. It is somewhat analogous to evidence tending to prove the competency of one who is called as an expert and the like.

**d. Extracts from Recent Authorities.**—The general rule in regard to such classes of evidence is addressed to the court, error cannot be alleged in respect to the decision thereto. The degree of proof which shall show that witness has experience enough to testify as an expert must be left to the trial judge. So too, the sufficiency of the proof which shall show that a paper is genuine so that it may be used for comparison must be also left to the trial judge. Possibly to admit a paper without any evidence of its genuineness might be error. *Hall v. Van Vrankin*, 64 How. Pr. 407.

This act was evidently intended to enlarge the rules of evidence and extend the facilities for testing the handwriting of a party, the genuineness of whose signature was disputed, beyond the opportunities afforded by the then existing rules. *Peck v. Callaghan*, 95 N. Y. 73.

Under former rules of evidence, it had been competent to give the evidence of experts as to the genuineness of handwriting by comparison with other specimens, which had already been admitted in evidence for other lawful purposes, the distinction being that it was not competent to introduce such specimens of handwriting for the sole purpose of comparison. *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470. The evils apprehended from the introduction of such evidence have been stated to be, first: The selection of unfair specimens of the handwriting, which is in

dispute, by the party offering them in proof; and second: The embarrassments arising from the multiplications of issues over the genuineness of the various signatures which might be offered in evidence. *Miles v. Loomis, supra*. The act in question leaves the character, number and sufficiency of identification of the specimens offered in evidence for the purposes of comparison entirely to the discretion of the court, and thus attempts to obviate the objections formerly existing to this species of evidence. *Peck v. Callaghan, supra*.

**e. Statutory Innovations Upon the Common Law Rule.—**

Even in other States where the common law rule has been relaxed, by statutory innovation, it is nevertheless held that the standard of comparison sought to be introduced must be either admitted to be genuine, or proved so to be by undoubted evidence. *McKeone v. Barnes*, 108 Mass. 344; *Pavey v. Pavey*, 30 Ohio St. 600; *Van Sickle v. People*, 29 Mich. 61; *State v. Hastings*, 53 N. H. 452; *Travis v. Brown*, 43 Pa. 9; *Baker v. Mygatt*, 14 Iowa, 131; *Heard v. State*, 9 Tex. App. 1.

It is reversible error to allow a document to go to the jury as a standard where the only proof of its genuineness consists in comparison by experts with some other writing admitted to be genuine. The court says: "It appears to us that the genuineness of the writing made the basis of comparison, called sometimes the standard writing, should be proved by direct or positive evidence;" and approve of the statement in an early Iowa case, that such proof should be by the testimony of a witness who saw it written, or by the person's admission when not offered by himself, or by some other positive proof. *Winch v. Norman*, 65 Iowa, 186.

A witness adopted as a standard a letter found addressed to himself purporting to come from a penitentiary convict, the authorship of which was subsequently acknowledged by such convict,—*held*, error to admit it as a standard; for in Texas a felon is incompetent as a witness, and therefore no admission or fact stated by such felon could be detailed or used as evidence against a third person for any purpose. Judgment reversed on this and other grounds. *Long v. State*, 10 Tex. App. 186.

**f. Unanimity of Recent Decisions.—**A series of decisions sustain the substantial unanimity of the proposition, that to render the witness an expert, competent to testify as to the genuineness

ness of a person's signature or handwriting, he must have seen such person write, or have been the recipient of social or business letters from him, which letters have been assumed to be genuine by both parties, or is shown to be competent by virtue of close study of comparisons where the spurious and genuine handwriting were the subject of contrast. *Strong v. Brewer*, 17 Ala. 706; *Keith v. Lothrop*, 10 Cush. 453; *Burnham v. Ayer*, 36 N. H. 182; *Pepper v. Barnett*, 22 Gratt. 405; *Hopkins v. Meguire*, 35 Me. 78; *West v. State*, 22 N. J. L. 212; *Woodford v. McClenahan*, 9 Ill. 85; *Edelen v. Gough*, 8 Gill, 87; *Garrells v. Alexander*, 4 Esp. 37; *Hammond v. Varian*, 54 N. Y. 398; *Board of Trustees v. Misenheimer*, 78 Ill. 22; *Bowman v. Sanborn*, 25 N. H. 87; *State v. Ward*, 39 Vt. 225; *Mrs. Medway's Case*, 6 Ct. Cl. 421; *Com. v. Eastman*, 1 Cush. 189; *Com. v. Coe*, 115 Mass. 481; *Sill v. Reese*, 47 Cal. 294; *Cody v. Conly*, 27 Gratt. 313; *State v. Spence*, 2 Harr. (Del.) 348; *Pearson v. McDaniel*, 62 Ga. 100; *Gordon v. Price*, 10 Ired. L. 385; *South Exp. Co. v. Thornton*, 41 Miss. 216; *Reyburn v. Belotti*, 10 Mo. 597; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482; *Rogers v. Ritter*, 79 U. S. 12 Wall. 317, 20 L. ed. 417; *Willson v. Betts*, 4 Denio, 201.

g. **Examination of Late Authorities.**—It is universally conceded that evidence of handwriting may be opinion merely; and it is as universally conceded that a witness who has either seen the party write, or who, not having seen him write, has received letters from him which have been “acted upon” by him as genuine, is competent to give an opinion as to his handwriting. And this competency is not affected by the lack of frequency of observation, the length of time which has elapsed since the writing was seen, or the slightness of the correspondence, although the weight of the opinion will of course depend much upon these circumstances. *Miles v. Loomis*, 75 N. Y. 288.

A comparison of the handwriting of papers introduced and relevant is permitted to ascertain the genuineness of the one in controversy. This rule was distinctly laid down in *Doe v. Newton* (5 Ad. & El. 514), and approved by the New York Court of Appeals in *Van Wyck v. McIntosh*, 14 N. Y. 442, and in a later case, *Mr. Commissioner Leonard*, writing for affirmance, says: “The comparison of handwriting is permitted where different instruments relevant to the controversy have been introduced for other purposes.” *Randolph v. Loughlin*, 48 N. Y. 456.

Another illustration will suffice. A witness had seen the defendant write his name once, and another who had never seen him write, but who had held his note, acknowledged and conceded to be genuine, were permitted to express their opinion and belief, against the defendant's exception, whether the signature was his. The objection taken to the testimony was, that they had not shown themselves sufficiently acquainted with the defendant's handwriting to testify as to its genuineness. This was not tenable. They had some means, although slight, of enabling them to judge whether the signature was that of the defendant, yet sufficient in their belief, to express an opinion in reference thereto. The extent of their knowledge, and the weight or effect to be given to their opinion, were proper matters for the consideration of the jury. *Hammond v. Varian*, 54 N. Y. 398.

#### **h. Chaotic Condition of this Question in Several States.**

IN INDIANA.—The fluctuation in judicial opinion regarding this topic has been violent and contradictory, and is several degrees removed from unanimity at this time. Indiana represents a chaotic condition, and if curiosity or self interest should prompt an investigation with a view of determining the present state of the law in that jurisdiction, we recommend an attentive perusal of the cases of *Clark v. Wyatt*, 15 Ind. 271, and *Shank v. Butsch*, 28 Ind. 20. These cases are supposed to typify the so-called English rule. These two decisions were subsequently repudiated in *Chance v. Indianapolis & W. G. R. Co.* 32 Ind. 473. Anything seemed preferable to the rule enunciated in *Clark v. Wyatt*, and the question was allowed to rest until 1877, the date of the last decision.

IN MARYLAND.—Maryland adopted at an early day the English rule and allowed signatures to be proved in the usual manner, except in cases of comparison, by which is meant the collation of two papers in juxtaposition for the purpose of ascertaining by inspection if they were written by the same person. This rule was re-affirmed in 1867, in *Tome v. Parkersburg B. R. Co.* 39 Md. 93; which case is supposed to announce the present rule governing this subject in that jurisdiction.

IN MISSISSIPPI.—Mississippi typifies the ruling in the southern states and admits in evidence a comparison by juxtaposition with the proviso that the documents with which the comparisons are made are not in issue in the case. *Garvin v. State*, 52 Miss. 209.

IN IOWA.—Evidence respecting handwriting may be given by comparison made by experts or by the jury, of writings of the same person which are proved to be genuine. Iowa Code, § 3655; *Baker v. Mygatt*, 14 Iowa, 131.

IN CALIFORNIA.—The California Code of Civil Procedure, while adopting a variant phraseology, is in essence and spirit a substantial redaction of the above. Various provisions are enacted by which evidence may be introduced upon the trial, and among the facts, allowed to be proved, and the evidentiary matter that may be introduced, we find, subdivision 9, the following: The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art or trade, when he is skilled therein. Cal. Code, § 1870.

**i. The Rule Merely Declaratory of the Common Law.**—The subdivision above quoted is but a legislative enactment of a well settled rule of evidence at common law. *Estate of Toomes*, 54 Cal. 509. Whether one offered as an expert is qualified to speak, as such, is a fact preliminary to his testifying as such to be determined by the court. *Fairbank v. Hughson*, 58 Cal. 314; *Neal v. Neal*, 58 Cal. 287; *Jones v. Tucker*, 41 N. H. 546. A person not a lawyer is incompetent to put, as an expert, a value on legal services. *Hart v. Vidal*, 6 Cal. 57. Where a contract relates to the mechanic or scientific arts, it is common and prudent to admit the opinion of experts to explain it, and where the evidence otherwise tends to limit or enlarge the apparent meaning of the words used, the opinions of witnesses who are in the habit of making and executing such contracts are almost indispensable. *Reynolds v. Jourdan*, 6 Cal. 112.

**j. Person Presumed Acquainted with Another's Handwriting, When.**—A person is deemed to be acquainted with the handwriting of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority, and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. Stephen, Dig. Art. 51.

**k. Comparison Permitted When.**—Comparison of a disputed handwriting with any writing proved to the satisfaction of the



judge to be genuine is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law or by consent of parties, authority to hear, receive and examine evidence. Stephen, Dig. Art. 52.

**1. No Standard as to Qualification.**—To qualify a witness to handwriting there is no standard fixed. It is sufficient if he has seen person write or writing be acknowledged, or that he has received letters from him in answer to letters written to him, or that in course of business he has habitually acted on papers purporting to be signed by the person, or that as a public officer he has had to pass on party's signature. *Smith v. Walton*, 8 Gill, 77; *Edelen v. Gough*, 8 Gill, 87; *Rideout v. Newton*, 17 N. H. 71; *Magee v. Osborn*, 32 N. Y. 669; *Hammond v. Varian*, 54 N. Y. 398; *State v. Spence*, 2 Harr. (Del.) 348; *Johnson v. Daverne*, 19 Johns. 134, 10 Am. Dec. 198; *Titford v. Knott*, 2 Johns. Cas. 211; *Southern Exp. Co. v. Thornton*, 41 Mass. 216; *Doe v. Suckermore*, 5 Ad. & El. 703; *Bowman v. Sanborn*, 25 N. H. 87; *Hess v. State*, 5 Ohio, 5; *Amherst Bank v. Root*, 2 Met. 522; *Bank of Commonwealth v. Mudgett*, 44 N. Y. 514; *United States v. Cases of Champagne*, 1 Ben. 241; *State v. Allen*, 1 Hawks, 6; *Hammond's Case*, 2 Me. 33, 11 Am. Dec. 39; *United States v. Simpson*, 3 Penr. & W. 437, 24 Am. Dec. 331; *Cochran v. Butterfield*, 18 N. H. 115, 45 Am. Dec. 363.

**m. Common Law Rule.**—As to the comparison of the writing to be proved with other writings at common law this could only be by those already in evidence and this rule is adopted in many states. *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346; *Williams v. Drexel*, 14 Md. 566; *Henderson v. Hackney*, 16 Ga. 521; *Hanley v. Gandy*, 28 Tex. 211; *Clay v. Alderson*, 10 W. Va. 49; *State v. Givens*, 5 Ala. 747; *Tome v. Parkersburg B. R. Co.* 39 Md. 36, 17 Am. Rep. 540; *Kannon v. Galloway*, 2 Baxt. 230; *Rott v. Kile*, 1 Leigh, 216; *Pierce v. Northey*, 14 Wis. 9; *West v. State*, 22 N. J. L. 212; *Board of Trustees v. Misenheimer*, 78 Ill. 22; *Clark v. Rhodes*, 2 Heisk. 206; *Otey v. Hoyt*, 3 Jones, L. 407; *Van Sickle v. People*, 29 Mich. 61; *McAllister v. McAllister*, 7 B. Mon. 269.

**n. Comparison Allowed in Several States.**—In other states comparison of disputed writings with others proved genuine, is

allowed by statute. *Wilson v. Beauchamp*, 50 Miss. 24; *State v. Hastings*, 53 N. H. 452; *Lyon v. Lyman*, 9 Conn. 55; *Moody v. Rowell*, 17 Pick. 490, 28 Am. Dec. 317; *Woodman v. Dana*, 52 Me. 9; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Bacon v. Williams*, 13 Gray, 527; *Bragg v. Colwell*, 19 Ohio St. 413; *Haycock v. Greup*, 57 Pa. 438; *Farmers Bank of Lancaster v. Whitehill*, 10 Serg. & R. 110; *Adams v. Field*, 21 Vt. 256; *Demeritt v. Randall*, 116 Mass. 331.

**o. An Exception Noted.**—There is one exception to the common law rule in regard to comparison of handwriting. If the instrument to be based as a standard is properly in evidence in the cause for other purposes, then the signature or paper in question may be compared with it by the jury. *Jumpertz v. People*, 21 Ill. 375; *Kernin v. Hill*, 37 Ill. 209; *Brobston v. Cahill*, 64 Ill. 358; *Whitney v. Bunnell*, 8 La. Ann. 429; *State v. Fritz*, 23 La. Ann. 55; *Williams v. Drexel*, 14 Md. 566; *Smith v. Walton*, 8 Gill, 86; *Tome v. Parkersburg & B. R. Co.* 39 Md. 36, 90, 17 Am. Rep. 540; *Van Wyck v. McIntosh*, 14 N. Y. 442; *Miles v. Loomis*, 10 Hun, 375; *Aff'd*, 75 N. Y. 288; *Randolph v. Loughlin*, 48 N. Y. 459.

There also is an exception in some cases when the writing is too old for any witness to prove it. *Woodard v. Spiller*, 1 Dana. 180, 25 Am. Dec. 139.

Genuineness of a signature to a lost instrument may be testified to by an expert who has examined the signature, and who testifies to his recollection as compared with genuine signatures in evidence. *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186.

Court may exclude another writing made by party during the trial for the purpose of evidence and offered by him for comparison. *Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356.

**p. When Expert is Disqualified.**—Expert who has no knowledge of writing of person, except from seeing him write several times, and that only for the purpose of testifying, is incompetent. *Reese v. Reese*, 90 Pa. 89, 35 Am. Rep. 634.

**q. Citation of Authority.**—For the purpose of proving the genuineness of a signature against a party to be charged thereby it is not competent to prove that the signature is not in a simulated handwriting. *Kowing v. Munly*, 49 N. Y. 193.

Evidence of a person competent to judge whether a writing is in the genuine hand of he who wrote it or is an attempt by some

person to imitate the hand of another, is admissible. *Lansing v. Russell*, 3 Barb. Ch. 325, 5 L. ed. 919; *People v. Hewit*, 2 Park. Crim. Rep. 20; *Moody v. Rowell*, 17 Pick. 490; *Com. v. Carey*, 2 Pick. 47; *Lyon v. Lyman*, 9 Conn. 55; *Lodge v. Phipper*, 11 Serg. & R. 333.

Apropos in this connection are the remarks of Judge Rapallo in *Kowing v. Manly*, *supra*, a case well considered and in high repute. Evidence offered for the purpose of proving that the order produced by the defendants was not a simulated handwriting was properly rejected. The plaintiff had not introduced any evidence to show that it was in a simulated handwriting, but had testified to the fact that it was not written by him. It was incumbent upon the defendants to prove that the order was in the handwriting of the plaintiff; and we do not think that as the evidence stood, the opinion of an expert that the signature was not in a simulated hand was competent for the purpose of establishing that it was the plaintiff's. In the cases cited (3 Barb. Ch. 325, 5 L. ed. 919, and 17 Pick. 490), for the purpose of proving that a mark or signature was not genuine, evidence of experts was admitted to show that the writing was simulated. The only case cited in which evidence was admitted to show that the writing was not simulated is that of *People v. Hewit*, *supra*, where on the trial of an indictment for forgery the prisoner was allowed to prove by an expert that the signature was not in a simulated hand. Whatever effect might be given to such evidence in a criminal case for counterfeiting or forgery, as to which we express no opinion, we do not think it competent for the purpose of proving the genuineness of a signature against a party sought to be charged thereby.

Where the proof as to the genuineness of the signature to a written instrument is about equally balanced, evidence tending to show a reason for the execution of the instrument and a reasonable probability or improbability that it was made and delivered, is competent. *Hunter v. Harris*, 131 Ill. 482.

Under the common law rule in force in the United States Courts, writings not in evidence for other purposes cannot be used for comparison with disputed writings to determine the question of handwriting. *Territory v. O'Hare* (N. D.) 44 N. W. Rep. 1003.

A comparison may be made between a signature admitted to be genuine and already in evidence for some other purpose, and a

signature whose genuineness is in question. *Swales v. Grubbs* 126 Ind. 106.

It frequently occurs, in actual experience that a party's signature is evidenced by a mark. This is most often the sign of the cross made in a little space left between the christian name and the surname (2 Bl. Com. 305); the word "his" is usually written above the line and the word "mark" below it. A mark is now held to be a good signature though the party was able to write. Bouv. L. Dict. *Title* "Mark." See also *Jackson v. VanDusen*, 5 Johns. 144.

**r. North Carolina Rule as to Comparison.**—A North Carolina case has held that testimony as to handwriting, founded on what is properly termed comparison of hands, seems to be now generally exploded. *Pope v. Askew*, 1 Ired. L. 17; but see *Yates v. Yates*, 76 N. C. 143. In Rhode Island, comparison by juxtaposition was not allowed. *Kinney v. Flynn*, 2 R. I. 319.

**s. Dissenting Views of the Texas Court.**—In Texas we find the usual aberrations from standard authority. The judiciary of that State gave the matter the most exhaustive and discriminating review, and after elaborate discussion of every apparent phase of the question, decided in favor of the old common-law rule, which prohibits proof of handwriting by comparison. *Hanley v. Gandy*, 28 Tex. 211. Another case reported in the same volume sustains the same view. These decisions were received with such dissatisfaction as to place the court in serious embarrassment, and rather than recede from a position so deliberately assumed, the Legislature was importuned and relief afforded by statutory enactment which provides, *inter alia*, that it is competent in every case to give evidence of handwriting by comparison made by experts or by the jury. Article 3182, Paschall's Dig.

**t. Authenticity of Signature, Comparison of Handwriting.**—Comparison of hands has always been considered a legitimate mode of determining as to the authenticity of a signature. Judge Loring speaks of it as a method sanctioned in *Mrs. Medway's Case*, 6 Ct. Cl. 421, and "the law of the court." It would be more accurate to say that it was adopted because found, on examination, to be the law of the land.

See the cases cited in 6 Ct. Cl. 429, 432, also *Henderson v. Hackney*, 16 Ga. 521; *McCorkle v. Binns*, 5 Binn. 349; *Lyon v. Lyman*, 9 Conn. 55; *Adams v. Field*, 21 Vt. 256; *Homer v.*

*Wallis*, 11 Mass. 309; *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 Pick. 315; *Chandler v. Le Barron*, 45 Me. 534.

u. **Cautionary Suggestions by Mr. Justice Bradley.**—The case of *Moore v. United States*, in which this question was under review, furnishes some cautionary suggestions. *Mr. Justice Bradley*, who delivered the prevailing opinion, evidently intended to limit his remarks in their applicability to the case at bar, which involved the question as to what rules of evidence should govern the action of the U. S. Court of Claims. The great majority of contracts and transactions which come before that court for adjudication are permeated and are to be adjudged by the principles of the common law. Where Congress has not provided and no special reason demands a different rule, the rules of evidence as found in the common law, ought to govern the actions of the Court of Claims. If a more liberal rule is desirable, it is for Congress to declare it by proper enactment. But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be the handwriting of a party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. *Moore v. United States*, 91 U. S. 270, 23 L. ed. 346. See also extended note appended to *Rogers v. Ritter*, 79 U. S. 12 Wall. 317, 20 L. ed. 417, where the authorities are fully collated.

§ 197. **Experts Entitled to Adequate Pay.**—Competent expert testimony is frequently of prime necessity, in order to establish the merits of the controversy, and it is entirely consistent with the policy of the law, that experts called to testify should be adequately paid.

Even the fact of payment for expert testimony, if unknown to the adverse party is not ground for a reversal. See *People v. Montgomery*, 13 Abb. Pr. N. S. 207.

a. **Views of New York Supreme Court.**—The question of payment for expert testimony when shown by competent evidence was carefully considered by the New York Supreme Court in a case which has been prolific of much controversy, and provocative of several well considered medico-legal pamphlets that have since expanded into a treatise on the general topic, pertaining to evidence

in its relations to mental disturbances, expert theorizing and compensation for loss of time. The principle case, that of *People v. Montgomery*, 13 Abb. Pr. N. S. 207, has been enriched by an editorial note of exceptional suggestiveness. From a perusal of this note we gather that a contract for compensation, conditioned on the success of the suit, by virtue of which contract an expert is to testify, is void. *Pollak v. Gregory*, 9 Bosw. 116. That the allowance of compensation to an expert witness for loss of time is of doubtful propriety, but on this point there are but two citations, *Collins v. Godefroy*, 1 Barn. & Ad. 950, and *Loneragan v. Royal Exch. Assur. Co.* 7 Bing. 729.

**b. Converse of the Above.**—The converse of the proposition is supported by an abundance of authority. *Webb v. Page*, 1 Car. & K. 23; *Moor v. Adams*, 5 Maule & S. 156; *Willis v. Peckham*, 1 Brod. & B. 515; *Lowry v. Doubleday*, cited in note to *Moor v. Adam*, 5 Maule & S. 159; *Severn v. Olive*, 3 Brod. & B. 72; *Parkinson v. Atkinson*, 31 L. J. C. P. 199; *Turner v. Turner*, 5 Jur. N. S. 839; 2 Phillips, Ev., 4th ed. 828, note.

§ 198. **Subscribing Witnesses as Experts.**—The subscribing witnesses to a will or deed, although in no sense displaying the qualifications of experts, may testify as to the mental condition of the testator or grantor at the time of the execution of the instrument, and they are not required to state previously the facts upon which they base their opinion. *Titlow v. Titlow*, 54 Pa. 216; *Williams v. Lee*, 47 Md. 321; *Van Huss v. Rainbolt*, 2 Coldw. 139; *Call v. Byram*, 39 Ind. 499.

**a. Non-Professional Witnesses, Conflict of Authority.**—There is great fluctuation in authority, as to whether non-professional witnesses, other than the subscribing witnesses may give their opinions or impressions on the subject of sanity. An examination of the authorities will emphasize this contradiction, especially from the states of Massachusetts, New Jersey, Iowa, and New York. Without attempting to reconcile the contradiction, we will cite the cases, after venturing upon the statement which is abundantly sustained by textwriters and adjudication, that the rule established by the New York courts, is in every sense the most satisfactory, and has the additional advantage of being well understood and settled beyond cavil by a long line of adjudication. The following decisions are pertinent upon the point in issue: *Poole v. Richardson*, 3 Mass. 330; *Dorsey v. Warfield*, 7 Md. 65;

*Kinne v. Kinne*, 9 Conn. 102; *Hunt v. Hunt*, 3 B. Mon. 575; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Choice v. State*, 31 Ga. 424; *Dunham's App.* 27 Conn. 192; *Berry v. State*, 10 Ga. 511; *Stewart v. Redditt*, 3 Md. 67; *Clark v. State*, 12 Ohio, 483; *Butler v. St. Louis L. Ins. Co.* 45 Iowa, 93; *Rambler v. Tryon*, 7 Serg. & R. 90; *Clary v. Clary*, 2 Ired. L. 78; *Boardman v. Woodman*, 47 N. H. 120; *Elder v. Ogletree*, 36 Ga. 64; *Ware v. Ware*, 8 Me. 42; *Ford v. State*, 71 Ala. 385; *People v. Sanford*, 43 Cal. 29; *Hathaway v. National L. Ins. Co.* 48 Vt. 335; *Doe v. Reagan*, 5 Blackf. 217; *Dicken v. Johnson*, 7 Ga. 484; *McClackey v. State*, 5 Tex. App. 331; *Barker v. Comins*, 110 Mass. 477; *Real v. People*, 42 N. Y. 282; *State v. Brunetto*, 13 La. Ann. 45; *Dickinson v. Barber*, 9 Mass. 225; *State v. Pike*, 49 N. H. 399; *McDougald v. McLean*, 1 Winst. L. 120; *Dove v. State*, 3 Heisk. 348.

b. **Cross-examination of Experts.**—Medical expert may be cross-examined as to whether he believes prisoner was able to distinguish right from wrong. *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481.

Experts stating their opinion as to sanity should state circumstances and symptoms from which their opinion is drawn. *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106.

c. **Testimony of Expert as to Mental Capacity.**—An expert may testify directly to mental capacity in either of three ways: 1. He may state his opinion based upon personal knowledge of the person; not upon hearsay nor upon conflicting testimony. 2. After hearing all the testimony on the question, if it is not conflicting he may give his opinion as to the mental condition indicated by it. 3. He may be asked what a supposed state of facts put to him hypothetically, corresponding in details to the facts already in evidence, would indicate as to mental condition. Question may have reference to facts in evidence on one side, or both, or on each side separately. *Heald v. Thing*, 45 Me. 396; *Sanchez v. People*, 22 N. Y. 147; *Bonard's Will*, 16 Abb. Pr. N. S. 128; *People v. Lake*, 12 N. Y. 358; *Woodbury v. Obear*, 7 Gray, 467; *Com. v. Rogers*, 7 Met. 500.

The distinguished Dr. Maudsley insists that evidence of insanity, in a doubtful case, should be left to medical experts. See *Popular Science Monthly*, Aug. 1872.

The cases further decide that where there is disagreement in the testimony of scientific witnesses, it is not error to refuse to

charge that the opinions of those who had not had practical experience on the subject, should be disregarded. The judge may submit the respective credit of such witnesses to the jury.

**d. Testimony of Non-Professional Witness—Expression of General Opinion.**—A non-professional witness may testify to facts within his own knowledge and after he has shown means of forming an impression, he may be asked the impression made on his mind at the time by the acts and declarations as to mental soundness. He cannot express a general opinion as to sanity nor his opinion independently of stating facts and circumstances. *Clapp v. Fullerton*, 34 N. Y. 190; *Pelamourges v. Clark*, 9 Iowa, 17; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Cram v. Cram*, 33 Vt. 15; *Dicken v. Johnson*, 7 Ga. 484; *De Witt v. Barly*, 17 N. Y. 340; *Irish v. Smith*, 8 Serg. & R. 578; *Hickman v. State*, 38 Tex. 190.

§ 199. **Hypothetical Question, Definition.**—An hypothetical case consists of a statement of assumed facts intended to be propounded to an expert, in order to elicit his opinion. Thus an expert in insanity may say whether a person under indictment for murder, would be likely to be predisposed to emotional insanity, upon a statement of facts, admitted or assumed, supposed to exhibit his individual and family history. *Anderson*, Law Dict. title "Hypothesis."

**a. When Expert may Give Opinion on.**—An expert may be asked his opinion upon a case hypothetically stated, or upon a case in which the facts have been established; but he may not determine from the evidence what the facts are, to give an opinion upon them. *Dexter v. Hall*, 82 U. S. 15 Wall. 9, 26, 21 L. ed. 73, 79, Strong, *J.*

**b. Duty of Counsel in Framing.**—Counsel in framing hypothetical questions to be put to expert witnesses, are not confined to facts admitted or absolutely proved, but facts may be assumed where there is any evidence on either side to establish, which are pertinent to the theories which they are attempting to uphold. In the direct examination of their own witnesses, it would tend to confusion if facts were assumed in hypothetical questions which did not bear upon the matters under inquiry, or which were not fairly within the scope of any of the evidence. Upon the cross-examination of an expert, counsel may not be so narrowly confined, but may, in putting hypothetical questions, assume any



facts pertinent to the inquiry, whether testified to by witnesses or not, with the view of testing the skill and accuracy of the expert; but such cross-examination must, to some extent, be under control of the trial court. The proposition here contended for finds ample vindication in a recent decision of the New York Court of Appeals. *Dilleber v. Home L. Ins. Co.* 87 N. Y. 79.

**c. Object of.**—The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded. *Hunt v. Lowell Gas Light Co.* 8 Allen, 169.

§ 200. **Qualifications of Expert, Information Necessary.**—A mere smattering of knowledge does not qualify a witness as an expert. He must have practical knowledge—such knowledge as is obtained by study, observation and reflection—the knowledge that gives any man eminence and credibility in a specialized department of scientific, artistic or mechanical industry. The authorities do not intimate that this knowledge must be of the most sublimated character—that it must include the technique and minutia of microscopic detail. Such criteria for an expert would speedily extinguish the entire class. *State v. Hinkle*, 6 Iowa, 380; *Washington v. Cole*, 6 Ala. 212; *Tullis v. Kidd*, 12 Ala. 648; *Morissey v. People*, 11 Mich. 327; *Wilson v. State*, 41 Tex. 320; *Polk v. State*, 36 Ark. 117; *St. Louis & S. F. R. Co. v. Edwards*, 26 Kan. 72; *Manhattan A. & B. R. Co. v. Stewart*, 30 Kan. 276; *Sandwich Mfg. Co. v. Nicholson*, 32 Kan. 666; *Mincke v. Skinner*, 44 Mo. 92; *State v. Wood*, 53 N. H. 484; *Dole v. Johnson*, 50 N. H. 452; *Shattuck v. Train*, 116 Mass. 296; *Castner v. Sliker*, 33 N. J. L. 95; *Consolidated R. E. & F. Ins. Co. v. Cashow*, 41 Md. 59; *House v. Fort*, 4 Blackf. 293; *Berry v. Reed*, 53 Me. 487; *Boardman v. Woodman*, 47 N. H. 120; *Hinds v. Harbou*, 58 Ind. 121; *Donaldson v. Mississippi & M. R. Co.* 18 Iowa, 280; *Benedict v. Fond du Lac*, 44 Wis. 495; *Graves v. Moses*, 13 Minn. 335; *State v. Secrest*, 80 N. C. 458; *Weaver v. Alabama C. Min. Co.* 35 Ala. 176; *Caleb v. State*, 39 Miss. 722; *Brownell v. People*, 38 Mich. 732; *State v. Reddick*, 7 Kan. 143.

**§ 201. Expert Testimony may be Shown to be Erroneous.**

—An expert testified that his opinion was sustained by all works of good authority, and that the “Modern Horse Doctor,” (Dodd), was a work of that kind. The opposite party was then allowed to show from the work of Doctor Dodd, that it laid down different doctrines. Graves, *J.*, says: “This evidence was offered to discredit this expert in connection with his cross-examination. The rule is acknowledged in this State, that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in the veterinary science; to be familiar with the best books which treat of it, and among others, with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness stand on the ailment of the plaintiff’s horse and his ailments. He borrowed credit for the accuracy of his statements, on referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, nor to prove the facts it contained, but to disprove the statements of the witness, and to enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness, and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of.” In *Cory v. Silcox*, 6 Ind. 39, “Evan’s Wheelwright Guide” was permitted to be read to the jury by way of illustration merely, but the court charged the jury that “extracts read from a scientific work are not of authority, conclusively or *prima facie*.”

Such books are evidence by statute. In *Stoudenmeier v. Williamson*, 29 Ala. 558, the court says: “We think that medical authors whose books are admitted or proven to be standard works ought to be received in evidence.”

See extended discussion appended to several notes to the case of *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60.

**§ 202. The Principle as Stated in a Recent Case.**—The principles which dominate this entire subject of expert testimony have received very recent vindication from the New York Court of Appeals (*Slocovich v. Oriental Mut. Ins. Co.* 10 Cent. Rep.

456, 108 N. Y. 56), and the conclusions of the text are fully sustained in the closely reasoned opinion of *Judge Earl* in the case referred to. A careful abridgment of his decision will disclose much interesting matter of vital importance to the subject under review. The action was brought to recover on a policy of insurance, and the question turned upon the value of the property destroyed; expert evidence was introduced under an allegation in the pleadings which charged a fraudulent over-valuation. A witness was asked this question: "What, in your judgment, judging from your personal knowledge of the vessel, gathered from your personal observation, and your knowledge from the ordinary results of wear and tear in ordinary use, was the market value in the port of New York of the ship *Zorka* in the month of April, 1883?" This question was objected to by the plaintiff and excluded by the court, on the ground, as we must assume from the record, that he did not have sufficient knowledge of the vessel to testify as to her value at the time she was burned. It will be observed that the witness was asked for his judgment, based solely upon his personal knowledge. It was for the trial judge to determine in the first instance whether the witness was competent as an expert to testify to the value of this vessel. He had not seen her for five or six years, and knew nothing about her condition at the time of her destruction. It did not appear what her condition was at the time he last saw her, and it appeared that subsequently to that time, and after the year 1880, the plaintiffs had expended at least \$7,000 in repairing her. Under such circumstances we cannot say that the judge committed any error in excluding the testimony. If the evidence had been received, it certainly would not have been entitled to very much weight with the jury. While it would not, we think, have been erroneous to receive and submit the evidence to the jury for what it was worth, we cannot say, as matter of law, that the judge exceeded the bounds of a reasonable discretion in holding that the witness was not qualified as an expert to give an opinion as to the value of the ship at the time she was burned. The rules determining the subjects upon which experts may testify, and prescribing the qualifications of experts, are matters of law; but whether a witness offered as an expert has those qualifications is generally a question of fact, to be decided by the trial judge.

And it has been held that his decision in reference thereto is not reviewable in an appellate court. *Searle v. Arnold*, 7 R. I. 582;

*Dole v. Johnson*, 50 N. H. 455; *Jones v. Tucker*, 41 N. H. 546; *Wright v. Williams*, 47 Vt. 222. The ruling of a trial judge that a witness is or is not shown to be sufficiently qualified to testify as an expert is a decision of a question of fact and is not reviewable on appeal. *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 453; *Searle v. Arnold*, 7 R. I. 582; *Dole v. Johnson*, 50 N. H. 455; *Jones v. Tucker*, 41 N. H. 546; *Wright v. Williams*, 47 Vt. 222; *Anthony v. Smith*, 4 Bosw. 503; *Sizer v. Burt*, 4 Denio, 426.

§ 203. **Non-professional Witnesses.**—Merchants, as experienced judges of goods and their values, are competent to testify as to the value of goods which, it is claimed, are invoiced below their true value. *Buckley v. United States*, 45 U. S. 4 How. 251, 11 L. ed. 961.

Proof of the value of an article, by a witness who had enquired of merchants dealing in the article and examined their books, when uncontradicted, is sufficient. *Cliquot v. United States* (“*Cliquot's Champagne*”) 70 U. S. 3 Wall. 114, 18 L. ed. 116.

a. **An Exclusionary Rule of Evidence.**—No rule of evidence is better understood than the exclusionary one by which non-professional witnesses are not allowed to express an opinion, either as to the merits of the case, or as to the legal features of it. To deduce conclusions from the facts proved, is the province of the jury alone. *Robertson v. Stark*, 15 N. H. 109; *Zachary v. Swanger*, 1 Or. 92; *Mobile M. D. & Mut. Ins. Co. v. McMillan*, 31 Ala. 711; *Carr v. Northern Liberties*, 35 Pa. 324; *Berry v. State*, 10 Ga. 511; *Lester v. Pittsford*, 7 Vt. 161; *Gavisk v. Pacific R. Co.* 49 Mo. 274; *Spear v. Richardson*, 34 N. H. 428; *Largan v. Central R. Co.* 40 Cal. 272.

Upon an issue, in a suit upon a life policy, as to the insanity of the insured at the time he took his own life, the opinion of a non-professional witness as to his mental condition, in connection with a statement of the facts and circumstances within his personal knowledge, upon which the opinion is based, is competent evidence. *Connecticut Mut. L. Ins. Co. v. Lathrop* (citing a long list of cases in foot note, 28 L. ed. p. 539), 111 U. S. 612, 28 L. ed. 536; *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. ed. 433.

Experts are not permitted to state their opinions in matters of common knowledge, such as the peculiar liability of property, from its situation, to fire. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256.

The opinion of commercial experts cannot be put in the place of that of the jury, upon a question which is as well understood by the community at large as by merchants and importers. *Schmieder v. Barney*, 113 U. S. 645, 28 L. ed. 1130.

**b. Review of Authorities.**—A non-professional witness after stating facts upon which his opinion is founded may state his opinion as to sanity. *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; 1 Redfield, Wills, 141; *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444; *Wogan v. Small*, 11 Serg. & R. 141; *Grabill v. Barr*, 5 Pa. 441; *Wilkinson v. Pearson*, 23 Pa. 117; *Bricker v. Lightner*, 40 Pa. 199; *Titlow v. Titlow*, 54 Pa. 216; *Dickinson v. Dickinson*, 61 Pa. 401; *Stewart v. Redditt*, 3 Md. 67; *Stewart v. Spedden*, 5 Md. 433; *Dorsey v. Warfield*, 7 Md. 65; *Weems v. Weems*, 19 Md. 334; *Kelly v. McGuire*, 15 Ark. 555; *Abraham v. Wilkins*, 17 Ark. 292; *Stewart v. Lispenard*, 26 Wend. 291; *Culver v. Haslam*, 7 Barb. 314; *De Witt v. Barley*, 13 Barb. 550, 9 N. Y. 371, 17 N. Y. 340; *Delafield v. Parish*, 25 N. Y. 37; *Clapp v. Fullerton*, 34 N. Y. 190; *Clarke v. Sawyer*, 3 Sandf. Ch. 357, 7 L. ed. 882; *Hoge v. Fisher*, Pet. C. C. 163; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349; *Clifford v. Richardson*, 18 Vt. 620; *Cram v. Cram*, 33 Vt. 15; *Cavendish v. Troy*, 41 Vt. 99; *Potts v. House*, 6 Ga. 324; *Berry v. State*, 10 Ga. 511; *Walker v. Walker*, 14 Ga. 242; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Dunham's App.* 27 Conn. 192; *Temple v. Temple*, 1 Hen. & M. 476; *Burton v. Scott*, 3 Rand. 399; *Den v. Gibbons*, 22 N. J. L. 117; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Re Vanauken*, 10 N. J. Eq. 192; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Garrison v. Garrison*, 15 N. J. Eq. 266; *Mercer v. Kelso*, 4 Gratt. 106; *Clary v. Clary*, 2 Ired. L. 78; *Heyward v. Hazard*, 1 Bay, 335; *Potts v. House*, 6 Ga. 324; *Berry v. State*, 10 Ga. 511; *Walker v. Walker*, 14 Ga. 242; *Clark v. State*, 12 Ohio, 483; *White v. Bailey*, 10 Mich. 155; *Beaubien v. Cicotte*, 12 Mich. 459; *Roberts v. Trawick*, 13 Ala. 68; *Norris v. State*, 16 Ala. 776; *Florey v. Florey*, 24 Ala. 241; *Powell v. State*, 25 Ala. 21; *Stubbs v. Houston*, 33 Ala. 555; *Re Carmichael*, 36 Ala. 514; *Doe v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Pelamourges v. Clark*, 9 Iowa, 1; *State v. Felter*, 25 Iowa, 67; *Roe v. Taylor*, 45 Ill. 485; *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441, overruling *Boardman v. Woodman*,

47 N. H. 120; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; contra, *Gehrke v. State*, 13 Tex. 568; *Wyman v. Gould*, 47 Me. 159; *Poole v. Richardson*, 3 Mass. 330; *Com. v. Fairbanks*, 2 Allen, 511; *Baxter v. Abbott*, 7 Gray, 71.

Medical men having no personal knowledge of the facts may be asked their opinions whether certain appearances detailed by other witnesses are symptoms of insanity. *Doe v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458.

§ 204. **Binding Force of Expert Testimony.**—The opinions of experts, however intelligent and trustworthy, do not bind the conscience of the court. *The Iberia*, 40 Fed. Rep. 893.

a. **Witness Confined Strictly to Facts Stated in Hypothetical Question.**—The opinion of an expert witness must be upon a hypothetical question containing facts which are assumed to have been proved; and such witness cannot be permitted to draw inferences from the evidence of other witnesses. *Gregory v. New York, L. E. & W. R. Co.* 55 Hun, 303.

b. **Personal Knowledge Necessary.**—The testimony of a witness as to the quantity of ore taken out of a mine is properly rejected where it does not appear that the witness personally knew anything about the quantity. *Patrick v. Graham*, 132 U. S. 627, 33 L. ed. 460.

c. **Speculative Questions Discountenanced.**—Expert questions of a purely speculative character, asked on cross-examination of a medical expert, should be confined to the facts of the case; the hypothetical questions must be predicated upon the facts proved. *Smalley v. Appleton*, 75 Wis. 18.

d. **Opinion Evidence not Binding.**—Opinion evidence as to the value of the professional services of an attorney is not, as a matter of law, conclusive on the jury. *Olson v. Gjertsen*, 42 Minn. 407.

Inferences from the facts are to be drawn and found by the jury, and cannot be proved as facts, by the opinions of witnesses. *People v. Barber*, 115 N. Y. 475.

e. **Non-Expert Evidence as to Sanity.**—A non-expert witness who was acquainted with the accused, may give his belief as to his sanity, without giving all the details upon which his opinion is based. *State v. Lewis*, 20 Nev. 333.

**f. When Prima Facie Evidence May be Rebutted.**—Prima facie evidence may be rebutted by developing additional facts consistent with its truth, but tending to an opposite conclusion, or by proving it untrue in whole or in some material part. *Georgia R. & Bkg. Co. v. Smith*, 83 Ga. 626.

**g. Opinion of Non-professional Witness as to Pain and Suffering.**—Opinions of non-professional witnesses as to the condition of health or the pain suffered by a person injured, based upon personal observations while in attendance upon such person, are admissible. *Shelby v. Claggett*, 5 L. R. A. 606, 46 Ohio St. 549.

**h. Testimony as to Value of Services.**—Testimony of a superintendent of a mining company as to the value of services rendered by the president and secretary outside of their duty as officers of the company is not sufficient to show the value of such services, where he resided at the mine, was seldom at the office (which was in another place) where the greater portion of the services was rendered, and did not know what the services rendered were. *Graves v. Mono Lake Hydraulic Min. Co.* 81 Cal. 303.

§ 205. **Views of Mr. Justice Stephen.**—Facts not otherwise relevant are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant. Stephen, Dig. Art. 50.

Whenever the opinion of any living person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant. Stephen, Dig. Art. 54.

§ 206. **Recent Cases Considered.**—A witness must state only facts, and leave the jury to draw their own inferences therefrom. *State v. Brooks*, 39 La. Ann. 817; *Gabbey v. Forgeus*, 38 Kan. 62.

A witness may give his opinion where the subject of the inquiry is so indefinite in its nature as not to be susceptible of direct proof. Authorities cited in *Guttridge v. Missouri Pac. R. Co.* 13 West. Rep. 646, 94 Mo. 468.

When a witness is adjudged to be an expert, he may be allowed to testify in questions of art or skill in which he is instructed by study or experience. *Chandler v. Thompson*, 30 Fed. Rep. 38; *Schneider v. Manning*, 10 West. Rep. 133, 121 Ill. 376.

Opinions of witnesses as to matters of fact which can be deter-

mined by the court or jury by a consideration of the evidence are inadmissible. *Schwander v. Birge*, 46 Hun, 66; *New Jersey Steamboat Co. v. New York*, 11 Cent. Rep. 478, 109 N. Y. 621; *Stumore v. Shaw*, 10 Cent. Rep. 109, 68 Md. 11; *Chandler v. Thompson*, 30 Fed. Rep. 38; *Chouteau v. Jupiter Iron Works*, 13 West. Rep. 666, 94 Mo. 388; authorities cited in *Hurt v. St. Louis, I. M. & S. R. Co.* 13 West. Rep. 235, 94 Mo. 255.

§ 207. **Form of Question and Testimony.**—An expert cannot give his opinion based upon conflicting evidence, but may give it upon a hypothetical case based upon evidence in the case. *Armendariz v. Stillman*, 67 Tex. 458.

The opinion of an expert must be based on proved or admitted facts, or upon such facts as are assumed to exist for the purpose of a hypothetical question. Authorities cited in *Deig v. Morehead*, 9 West. Rep. 204, 110 Ind. 451.

A hypothetical question put to a witness with the view of eliciting an opinion thereon should include only such facts as are admitted or established, or which there is evidence tending to establish. *Re Norman's Will*, 72 Iowa, 84; *Pollock v. Morris*, 7 Cent. Rep. 752, 105 N. Y. 676; *Reber v. Herring*, 7 Cent. Rep. 841, 115 Pa. 599.

A hypothetical question may assume facts within the range of the evidence, which the party believes the evidence tends to establish. *Louisville, N. A. & C. R. Co. v. Wood*, 12 West. Rep. 303, 113 Ind. 544.

§ 208. **Expert must State upon What he Bases his Conclusion.**—An expert cannot state he has heard the testimony of a witness, and then base his opinion upon such testimony, without stating particular points upon which he rests his conclusion. *Keyser v. Chicago & G. T. R. Co.* 10 West. Rep. 646, 66 Mich. 390.

a. **What Hypothetical Question Should Embrace.**—Hypothetical questions may embrace facts which are not, standing alone, the subject of expert testimony. *Turnbull v. Richardson*, 14 West. Rep. 444, 69 Mich. 400.

b. **Rule in Condemnation Proceedings.**—In condemnation proceedings, the question, "How much less, in your opinion, was this farm worth after the railroad company had established its track through it?"—put to a witness shown to be well acquainted



with the land and with its value, is competent. *Bryan v. McNaughton*, 38 Kan. 98.

**c. In Actions for Damages.**—In an action for damages caused by a railroad in the street, witnesses cannot be allowed to state “What difference is there in value of the property with the track there, and with it somewhere else?” They should state the value before, and also the value after the laying of the track, as primary facts for the jury to base their own conclusion upon. *Columbus, H. V. & T. R. Co. v. Gardner*, 11 West. Rep. 264, 45 Ohio St. 309.

§ 209. **Education in the Particular Profession will Qualify as Expert.**—Where a person has been educated in a particular profession,—as a physician, surgeon or veterinarian,—he is presumed to understand thoroughly the questions pertaining to his profession; but a person not a member of those professions, who has read extensively from books, and heard the testimony of experts in court in regard to the diseases of men or cattle, is not considered an expert concerning the same. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

§ 210. **Instances of Competent Expert Testimony.**—A medical expert in attendance upon the trial is properly permitted to answer a question as to whether, in his opinion, from a medical standpoint, from the evidence given in the case, testator was of sound mind on a certain date. *Schneider v. Manning*, 10 West. Rep. 133, 121 Ill. 376.

Non-expert witnesses may give opinions as to the sanity or insanity of a person, first stating the facts, so far as possible, upon which their opinions are based. *State v. Bryant*, 12 West. Rep. 334, 93 Mo. 273; *Cline v. Lindsey*, 9 West. Rep. 218, 110 Ind. 337; authorities cited in *Stephenson v. State*, 9 West. Rep. 235, 110 Ind. 358.

The rule that a witness, not an expert, may express an opinion as to the sanity of another, having first detailed the facts and circumstances upon which the opinion is formed, is not infringed by testimony as to the respect in which the mental condition of a testatrix appeared to be different during her last sickness from what it had been prior thereto, the witness giving the facts and circumstances upon which the opinion is based. *Re Norman's Will*, 72 Iowa, 84.

Prudence and good seamanship in the management of a tug

are proper subjects of expert testimony. *Union Ins. Co. v. Smith*, 124 U. S. 405, 31 L. ed. 497.

Where a pilot boat is sunk by a steamer certain manœuvres, the usage of navigation under similar circumstances, may be shown by the evidence of experts. *Van Pelt v. The Alaska*, 33 Fed. Rep. 107.

A statement by a witness as to the distance a light could be seen, based upon his knowledge obtained from his observation and experience as a mariner, is admissible. *Case v. Perew*, 46 Hun, 57.

An intelligent man accustomed to observe moving objects is competent to testify as to the rate of speed of a moving train. Authorities cited in *Guggenheim v. Lake Shore & M. S. R. Co.* 9 West. Rep. 907, 66 Mich. 150.

Evidence of the market value of an article is not objectionable because it is in some measure the opinion of the witness. *Ft. Worth & D. C. R. Co. v. Hogsett*, 67 Tex. 685.

Where property sought to be condemned by a railroad company is shown to have no market value, it is proper to allow witness, who testifies that he platted the land and fixed the prices of lots, a part of which are sought to be condemned, and that he is acquainted with the value of the property in that vicinity, to testify to the value of the lots taken. *St. Louis, K. & A. R. Co. v. Chapman*, 38 Kan. 307.

In condemnation proceedings, where the property has a market value, the rule is strict and requires only that value to be shown that the property is without a market value, then the law allows the next best evidence to ascertain its value. The property then may be compared with other property; the value may be shown by persons who are shown to be judges or who have knowledge of the value of real estate in that vicinity, and their opinions of the value of the property may be given. *Ibid.*

The expressed opinion by the occupant of a house for seventeen years, of its value, is competent evidence against him, without proof of his qualification to judge of its value. *Patch v. Boston*, 5 New Eng. Rep. 473, 146 Mass. 52.

A witness is not disqualified from giving an opinion as to the value of the vessel, merely because he has no personal knowledge of the vessel, where its character, condition and quality have been sufficiently proved. *Slocovich v. Orient Mut. Ins. Co.* 10 Cent. Rep. 456, 108 N. Y. 56.

The value of services of an attorney employed in the probate

and establishment of a will, and the management and settlement of a large estate, and the settling of a dispute with certain of the heirs, is a proper question for the opinions of lawyers as expert witnesses. *Kelley v. Richardson*, 14 West. Rep. 416, 69 Mich. 430; *Sleator v. Richardson*, 14 West. Rep. 431, 69 Mich. 478.

In an action for slander a witness may state his understanding of the words used. *Binford v. Young*, 13 West. Rep. 813, 115 Ind. 174.

In a prosecution of libel, the question to whom the alleged libelous publications referred to is for the jury, and a witness cannot testify thereto. *People v. McDowell*, 71 Cal. 194.

In an action by a widow and her minor children to recover from a saloon keeper for loss of means of support, caused by the death of the husband and father by suicide in consequence of continued intoxication, hypothetical questions put to expert physicians, as to the probable effect of the continued use of intoxicating drinks in causing suicide, are admissible. *Poffenbarger v. Smith*, 27 Neb. 788.

A medical expert may be cross-examined by asking him whether certain statements are not made by authorities on the subject and the statement may be read from a medical book in asking the question. *Hess v. Lowrey*, 7 L. R. A. 90, 122 Ind. 225.

The opinions of witnesses as to values may be based upon a hypothetical statement of what has been already proved in the case as to the quality, conditions and situations of the property, as upon their own actual observation. *Moore v. Chicago, M. & St. P. R. Co.* 78 Wis. 120.

A sufficient foundation is laid to warrant a witness to give an opinion upon the value of stock of merchandise where he states that he has been engaged in the business of a merchant for six years and that he attended the sheriff's sale and purchased the entire stock in controversy. *Butler v. Howell*, 15 Colo. 249.

The safety of a rule given for the guidance of railroad employees is not a question for expert testimony. *Nary v. New York, O. & W. R. Co.* (Sup. Ct.) 29 N. Y. S. R. 630.

It is competent for witnesses although not experts to state their own observations and experience as to the distance within which a train can be stopped; not for the purpose of expressing an opinion but simply to state facts within their observation. *Harmon v. Columbia & G. R. Co.* 32 S. C. 127.

Testimony of a witness that, judging from appearances and his

inspection of a bridge alleged to have been defective, he should think it needed repairs, is mere matter of opinion and inadmissible. *Baldrige & C. Bridge Co. v. Cartrett*, 75 Tex. 628.

An expert who is a party should not be allowed to give his own opinion upon the propriety of his own conduct. *Hudson v. Georgia P. R. Co.* 85 Ga. 203.

As bearing upon the seaworthiness of a vessel engaged in the coastwise trade, it is competent for the master to testify in relation to the selection of his mate, "I had every reason to suppose the man was sufficient for a coasting mate. I believed at the time he was capable." *Hutchins v. Ford*, 82 Me. 363.

The opinion of a physician who is called as an expert, who has not made a special study of mental diseases, may be excluded in questions of insanity. *Ibid.*

A hypothesis submitted for the opinion of an expert witness must be based upon the proofs and must not go outside the facts as to which some evidence has been given. *People v. Smiler* (Ct. App.) 35 N. Y. S. R. 1, 125 N. Y. 717.

Evidence respecting handwriting may be given under Neb. Code, § 244, by comparisons made by experts or the jury with the writings of the same persons which are proved to be genuine. *Grand Island Bkg. Co. v. Shoemaker* (Neb.) 47 N. W. Rep. 696.

Witnesses familiar with the value of a stone quarry upon a right of way, which will be destroyed by reason of the grading and road-bed of a railway, are competent to testify as to the value of such quarry. *Burlington & M. R. Co. v. White*, 28 Neb. 166.

A question to a physician who made an examination of a person suing for personal injuries, as to whether the absence of external appearances of injury is consistent with his medical books is not proper on the ground that the books are the best evidence of their contents, as the question calls for the witness's opinion as a medical man. *Blair v. Madison County* (Iowa) 46 N. W. Rep. 1093.

Opinions of medial experts as to the sanity of the accused, based upon their own knowledge and conversations with him, are admissible. *Taylor v. State*, 83 Ga. 647.

An attorney is competent to testify as to the value of his services for which he brings action. *Chamberlain v. Rodgers*, 79 Mich. 219.

A witness who kept tally on a shingle of lumber shipped is competent to testify as to the quantity of lumber although after

he copied the tally into a certificate he threw the shingle away. *Crane Lumber Co. v. Otter Creek Lumber Co.* 79 Mich. 307.

To render competent the opinion of witnesses the subject must be one of science or skill, or one of which observations and experience have given the opportunity and means of knowledge which exists in reasons rather than descriptive facts, and cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it. *Van Wycklen v. Brooklyn*, 118 N. Y. 424.

The purpose of expert evidence is to aid the jury in their deliberations on the case and in their review of the evidence, and to be competent for that purpose it must, where the questions involved are not open ones of science or art, be based upon evidence in the case, and confined to the causes of the injury complained of. *Ibid.*

Upon an issue as to whether the person injured was in the exercise of ordinary care, there being eye-witnesses of his conduct at the time of his injury, the opinions of experts as to whether he was generally a careful and skillful man are incompetent. *Southern Kansas R. Co. v. Robbins*, 43 Kan. 145.

The testimony of an experienced seaman relative to proper measures which should be taken to prevent stranding is competent as bearing on the proper navigation of a vessel. *Hutchins v. Ford*, 82 Me. 363.

The representations as to the value of property, although ordinarily treated as a matter of opinion, may properly be received in evidence when they connect with and serve to characterize other material averments. *Haven v. Neal*, 43 Minn. 315.

The opinion of a witness upon a hypothetical state of facts as to which there is no evidence is inadmissible. *Prather v. McClelland*, 76 Tex. 574.

A farmer who for forty years has been familiar with a farm and the buildings upon it, and who is conversant with the selling price of lands in the neighborhood, is competent to testify to its value. *Curtin v. Nittany Valley R. Co.* 135 Pa. 20.

Witnesses may give their understanding of alleged slanderous words spoken in their presence. *Freeman v. Sanderson*, 123 Ind. 264.

A person who is not an expert cannot testify as to the mental condition of another without giving the facts upon which the opinion to be stated rests. *Burkhart v. Gladish*, 123 Ind. 337.

A witness familiar with the running of trains may testify as to

the speed at which certain trains were running. *Pence v. Chicago, R. I. & P. R. Co.* 79 Iowa, 389.

A competent witness may state the results of his examination of books of account which are in evidence to aid the jury. *State v. Cadwell*, 79 Iowa, 432.

When the inquiry is about a matter that may be understood by one man of sense as well as another, and where no special course of study or training is required to understand it, opinions of experts are rejected. *Shelley v. Austin*, 74 Tex. 608.

Those who are employed in the business of railroading come within the rule rendering admissible the opinions of those who are engaged in a particular art or trade. *Ft. Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501.

The opinion of a non-expert witness as to whether the testator had mind sufficient, at the time he is alleged to have executed his will, to give the specific instructions with reference to the particular property contained therein, covers the whole issue on the question of testamentary capacity; and its reception in evidence is in violation of the rule limiting witnesses to the statement of facts within their knowledge. *Re McCarthy*, 55 Hun, 7.

A professional builder of bridges is competent to testify as to how long stringers in bridges usually last, as tending to show the degree of care required in the examination of stringers. *Blank v. Livonia Twp.* 79 Mich. 1.

## CHAPTER X.

### HEARSAY EVIDENCE.

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### § 211. Hearsay Evidence Irrelevant When.

a. **The English Rule.**—The fact that a statement was made by a person not called as a witness, and the fact that a statement is contained or recorded in any book, document or record whatever, proof of which is not admissible on other grounds, are respectively deemed to be irrelevant to the truth of the matter stated, except in certain cases. Stephen, Dig., art. 14.

b. **The Unsatisfactory Nature of the Definition.**—The above is Mr. Stephen's statement of the present English rule. Commenting on his own paragraphs the distinguished author says: "The unsatisfactory character of the definitions usually given of hearsay is well known. See Best, c. 495; T. E. §§ 507-510. The definition given by Phillips sufficiently exemplifies it: 'When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, states the language of others which he has heard, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This matter may sometimes be the very matter in dispute,' etc. (1 Phil. Ev. 143). If this definition is correct, the maxim, 'hearsay is no evidence,' can only be saved from the charge of falsehood by exceptions which make nonsense of it. . . . There is no real difference between the fact that a man was heard to say this or that, and any other fact.' Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, etc., etc.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted."

c. **Importance of Hearsay Evidence.**—One of the most important of the rules of evidence in regard to relevancy is that which is frequently summarized by the maxim "hearsay is no evidence," but which may be more accurately given thus: The fact that a statement has been made by a person not called as a

witness, or is contained in any book, document or record whatever, proof of which is not admissible on other grounds, is not relevant as a fact from which the truth of the fact stated may be inferred, except in certain cases hereinafter mentioned. This rule is not applicable to the case of words or exclamations accompanying an act which are received in evidence as part of the *res gestæ*, or to such as are offered merely as indicative of the actual state of mind or feeling of the person using them, at the time when they were uttered, but refers solely to narratives of past occurrences. The reasons for the rule excluding hearsay, or as Best more accurately terms it, "Derivative evidence," are not difficult to discover, for apart from the circumstances that the probabilities of falsehood and misrepresentation, either wilful or unintentional, being introduced into a statement are greatly multiplied every time it is repeated, there remains the further fact that the original statement, even if correctly reported, has scarcely ever been made under the safeguards of the personal responsibility of the author as to its truth, or the tests of a cross-examination as to its accuracy. Reynolds, *Theory of the Law of Ev.* §§ 16, 17.

**d. Limitations Upon the Rule.**—When a witness, in the course of stating what has come under the cognizance of his own senses relative to a matter in dispute, states the language of others which he has heard, or produces paper which he identifies as having been written by particular individuals, he offers what is called hearsay evidence. The term is used with reference both to that which is spoken and to that which is written. In its legal sense, however, it is confined to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also, in part, on the veracity and competency of some other person from whom the witness may have received his information. 1 Phil. Ev. 169. When the court admits a part of the evidence of a plaintiff given on the trial of another cause, it is error to prevent a witness from giving all his evidence relating to the matter in issue. *Aulger v. Smith*, 34 Ill. 534. Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact, which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. Haines' Treatise, 649.

**e. Intrinsic Weakness of this Grade of Evidence.**—Its intrinsic weakness, its incompetency to satisfy the mind as to the

existence of the fact, and the frauds which may be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible. 1 Greenl. Ev. § 99. This is the general rule, and we find it generally enunciated that "hearsay is not evidence." The language of this maxim is not strictly accurate, conveying as it does, the idea that what a person has been heard to say is not receivable as evidence—an assertion which every day's experience refutes. What a man has been heard to say against his own interest is not only receivable as evidence, but is generally the best evidence against him. *Prior v. White*, 12 Ill. 265; *Birchard v. Booth*, 4 Wis. 67; *Bridge v. Eggleston*, 14 Mass. 245; Best, Ev. § 330.

**f. Admitted as Part of Res Gestæ.**—Hearsay is often admitted as evidence as part of the *res gestæ*; as where it is necessary to inquire into the nature of a particular act, and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence, for the purpose of showing its true character (1 Phil. Ev. 233; *Latham v. Smith*, 45 Ill. 25; *Comfort v. People*, 54 Ill. 404; *Nelson v. Smith*, 28 Ill. 495; *Rigg v. Cook*, 9 Ill. 336; *Welch v. Louis*, 31 Ill. 458; *Cooper v. Randall*, 59 Ill. 317); but a party cannot make evidence for himself in this way, and claim its admissibility as part of the *res gestæ*. *McCausland v. Wonderly*, 56 Ill. 410.

**g. Cardinal Principles of Exclusion.**—Whatever may have been the foundation for this rule, the principle of exclusion which is now its inseparable accompaniment has long been recognized. The maxim "hearsay is no evidence" is an expression inaccurate in every way, and one which has caused the nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind; first, directly, that what a person has been heard to say is not receivable in evidence; and second, by implication, that whatever has been committed to writing, or rendered permanent by other means is receivable—positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable but is the very best evidence against him; and on the other, as already stated, written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with *res gestæ*, *i. e.*, the

original proof of what has taken place, and which the least reflection will show may consist of words, as well as of acts.

**h. Bouvier's Definition.**—I will add that the definition most in vogue, and the one adopted substantially by Bouvier, is that given by Taylor in his *Treatise on the Law of Evidence*. "The term hearsay is used with reference to what is done or written, as well as to what is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competency of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that it supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency, to satisfy the mind as to the existence of the fact, and the frauds which may be practiced with impunity under its cover, combine to support the rule that hearsay evidence is inadmissible."

**i. Reasons for Rejection of.**—As a test of truth it is found indispensable to the due administration of justice, that every living witness should be subjected to the ordeal of a cross-examination, that it may appear what were his powers of perception, his opportunities for observation, his attentiveness in observing, the strength of his recollection and his disposition to speak the truth. But testimony which is derived from the relations of third persons, even when the informant is known, cannot be subjected to this test nor is the statement under oath, and besides it is frequently impossible to ascertain through whom, or how many persons the narration has been transmitted from the original witnesses of the fact. There are several exceptions to this rule which excludes hearsay evidence. But those cases in which it is received are of that character which sufficiently guards against frauds, and in most of them rejection of the evidence would work a greater mischief than could result from its reception. 3 Wait, L. & Pr. (5th ed.) 430.

The channel through which hearsay evidence comes does not change its nature; it continues hearsay evidence and inadmissible, though repeated by a party to the suit as mere hearsay. *Stephens v. Vroman*, 16 N. Y. 381.

So declarations of third persons are inadmissible, although they were made concerning a fact which would be relevant to the issue if proved by a competent witness. *Bevis v. Baltimore & O. R. Co.* 26 Mo. App. 19.

Testimony of a witness as to what he has been told, but of which he knows nothing personally, is mere hearsay. *Sangster v. Dalton* (Ark.) 12 S. W. Rep. 202; *Crockett v. Althouse*, 35 Mo. App. 404.

Testimony of a physician that other physicians concurred with him in his opinion as to the nature of a wound is merely hearsay and inadmissible. *Hussey v. State*, 87 Ala. 122.

**j. Stating Language of Others, Hearsay.**—When a witness, in the course of stating what has come under the cognizance of his own senses, concerning a matter in dispute, states the language of others, which he has heard, or produces papers which he identifies as being written by certain individuals, he offers what is called hearsay evidence. This evidence may sometimes be the very matter in dispute, or something from which a pertinent inference, relative to the matter in dispute may be drawn; or on the other hand, it may consist of a verbal or written narrative of facts received from the witness from some other person which he delivers at second hand to the court. This term, hearsay evidence, is used with reference both to that which is written and that which is spoken. But in its legal sense it is confined to that kind of evidence (whether written or spoken) which does not derive its credibility solely from credit due the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information. It may be here stated that the general rule is, and it is a rule of very extensive influence, that hearsay evidence is not receivable. 3 Wait, L. & Pr. (5th ed.) 429.

As stated in the above paragraph, the term applies to written as well as oral matter, but the writing or words are not necessarily hearsay, because those of a person not under oath. Thus information on which one has acted; the conversation of a person suspected of insanity; replies to inquiries; general reputation; expressions of feeling; general repute in the family on questions of pedigree; a great variety of declarations, (see "*Declarations*"); entries made by third persons in the discharge of official duties; entries in the party's shop-book, or other books kept in the regular course of business; indorsements of partial payments,—have been

held admissible as original evidence under the circumstances, and for particular purposes.

Matters relating to public interest may be proved by hearsay testimony, but the matter in controversy must be of public interest; the declarations must be those of persons supposed to be dead, and must have been made before controversy arose. Bouvier's Law Dict. *title* Hearsay Evidence."

**k. The Most Satisfactory Evidence Attainable.**—The most satisfactory evidence which can be afforded is the evidence of our own senses. But in judicial investigations, the court and jury cannot have that kind of evidence, since they must decide upon the evidence adduced at the trial.

The great bulk of the proof which is made in the trial of actions is the testimony of witnesses orally delivered; the power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description, are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanor, and of determining the just weight and value of his testimony. 1 Greenl. Ev. (14th ed.) § 446. But where the testimony is in the nature of a narration by third parties—even in cases where the integrity of such persons is unquestioned—it is impossible to exercise the safeguards that cross-examination guarantees, and the testimony is subjected to all the infirmities of a treacherous memory or an imaginative mind.

**1. Former Embarrassment Removed.**—Whatever embarrassment may infest the treatment of this subject, or the definition given by English commentators, all possible misconception of the principles regulating it, so far as the practical application of it by the jurists of this country is concerned, has been entirely removed by the singularly logical exposition the entire topic received from *Chief Justice* Marshall, in the case of *Mima Queen v. Hepburn*, 11 U. S. 7 Cranch, 281, 3 L. ed. 348. The opinion there rendered has passed into a classic and has been received without

murmur or dissent as the most thoroughly logical exposé of the subject ever attempted. The principles this case established, the vigor of the reasoning employed, the conciseness of the statement and the pitiless logic of the conclusion reached all serve to invest this case with exceptional interest. I excerpt from the opinion the following passages, as they disclose both the principle and authority upon which much that is valuable in the entire domain of hearsay evidence depends.

**m. Views of Chief Justice Marshall.**—"This court cannot perceive any legal distinction between the assertion of this, and of any other right which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which the court shall establish in this cause will not, in its application, be confined to cases of this particular description but will be extended to others where rights may depend on facts which happened many years past.

"It was very justly observed by a great judge, 'that all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.'

"One of these rules is, that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

"To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact.

"It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye-witnesses to that fact are

dead; but if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all.

"If the circumstances that the eye-witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained." *Mima Queen v. Hepburn*, 11 U. S. 7 Cranch, 291, 3 L. ed. 348.

Further comment would be an impertinence. This language of the Chief Justice has been cited with approval by the courts of every State in the American Union, and as recently as 1868 the same high tribunal from which the original decision proceeded, re-examined and reaffirmed the principles of this salutary rule, and that, too, in the course of an equally celebrated case involving the application of a well recognized exception to the rule of exclusion adopted in the earlier one. *Vide* Opinion Clifford, *J.*, *Travelers Ins. Co. v. Mosley*, 75 U. S. 9 Wall. 397, 19 L. ed. 437.

**n. Prevalence of the Exclusionary Rule.**—The consistency with which the courts adhere to the exclusionary rule, rejecting hearsay evidence, is not less apparent than the cordiality with which they admit evidentiary matter falling under any subdivision of the well recognized exceptions to the rule. Those exceptions are subdivided by text-writers in various ways. The tabulation I adopt has at least the merits of convenience.

**o. Exceptions Under which Hearsay is Admissible.**—(1) Exceptions as to *Res Gestæ*. (2) As to Admissions. (3) As to Public Documents. (4) As to Judicial Documents. (5) As to Matters of Pedigree and Ancient Possession. (6) As to Declarations Against Interest. (7) As to Declarations or Entries made in the Course of Professional Duty or Business. (8) As to the Testimony on a Former Trial of Witness since Deceased. (9) As to Dying Declarations. (10) As to Telephonic Communications.

The above tabulation naturally divides into two classes. The first class includes statements made under circumstances which render it unnecessary or inexpedient to either swear the witness or cross-examine him. These would embrace:



- I. Admissions.
- II. Statements in Public Documents.
- III. Statements in Judicial Records.
- IV. Statements showing the existence of a general reputation in cases where the existence of such reputation is a relevant fact.

The second class would naturally include all not mentioned in the first. These several exceptions to the rule of exclusion will be considered subsequently, after first disposing of the somewhat involved and intricate topic of *Res Gestæ*, the proper apprehension of which will vastly simplify our analysis of the remaining propositions.

### § 212. Doctrine of the *Res Gestæ*, Principles Involved.

a. **Definitions by High Authorities.**—*Res gestæ* has received its most apt and logical definition from the Supreme Court of Georgia, in *Carter v. Buchanan*, 3 Ga. 513: "The circumstances, facts and declarations which grew out of the main fact, are contemporaneous with and serve to illustrate its character are part of the *res gestæ*." They must in all cases be contemporaneous with the main fact; they must have been made at the time of the act done, to which they relate, and must be well calculated to unfold the nature and quality of the facts they were intended to explain, and to so harmonize them as obviously to form one transaction. *Enos v. Tuttle*, 3 Conn. 250.

They are the circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. *Nutting v. Page*, 4 Gray, 584.

Starkie says *res gestæ* are the surrounding facts of a transaction, and may be submitted to a jury, provided they can be established by competent means sanctioned by law, and afford any fair presumption or inference as to the question in dispute. And again, it is said that declarations accompanying an act, explanatory of that act, are *res gestæ*. They are the surrounding facts—explanatory of an act or showing a motive for acting. But the principal fact must be first established; and until it is established, surrounding facts are not admissible; and certainly exhibiting surrounding facts is not establishing a principal fact. *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437.

Undoubtedly whenever evidence of an act done by a party is admissible, the declarations he made at the time the act was done are also admissible, if they were of a character to elucidate and

unfold the act, because they derive a degree of credit from the act itself, and do not rest entirely upon a statement not made under oath. *Sessions v. Little*, 9 N. H. 271.

Much of the difficulty in the application of the rule arises from the nature of the principal act, especially where it is continuous, or extends for a considerable time, as in questions of domicile or of bankruptcy; but there is no difficulty in applying the rule in cases where the principal act is single and well defined as to time, nor is there any well considered case, which gives any countenance to the admission of such declarations, unless they were made at the time the principal act was done, or as in case of a riot, during the continuance of the transaction. *Russell v. Frisbie*, 19 Conn. 209; *Carter v. Beals*, 44 N. H. 412; *Price v. Powell*, 3 N. Y. 322; *Ridley v. Gyde*, 9 Bing. 351.

**b. Equity Rules Regulating.**—Equity rules are the same as the rules at common law, as appears by the decision of Chancellor Walworth in *Re Taylor*, 9 Paige, 617, in which he held that the declarations of parties and other attending circumstances, in order to render them admissible as a part of the *res gestæ*, must be contemporaneous with the main fact under consideration, and to which they were intended to give character. *Frink v. Coe*, 4 G. Greene, 556.

**c. Conclusions of the Supreme Judicial Court of Massachusetts.**—The Supreme Judicial Court of Massachusetts, after careful and discriminating review of the authorities bearing upon this topic of *res gestæ*, formulate the following conclusions, which may be regarded as the principles still controlling in all cases, and the tests by which this class of questions must be determined:

1st. That the admission of such evidence is not left to the presiding judge, as had sometimes been supposed; that its admission is governed by principles of law, which must be applied to particular cases as other principles are applied, in the exercise of a judicial judgment, and that errors of judgment in that case, as in other cases, may be examined and corrected.

2d. That a declaration, if it has its force by itself, as an abstract statement, detached from any particular fact in question, is not admissible in evidence, because it depends for its effect on the credit of the person making it, and therefore is hearsay.

3d. That mere narrative is never admissible, because such statements are detached from any material act which is pertinent to the issue.

4th. That whenever the act of the party may be given in evidence, his declarations made at the time are also admissible, if they were calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction.

5th. That there must be a main or principal fact or transaction and that such declarations only are admissible as grow out of the principal transactions, serve to illustrate its character, are contemporaneous with it, and derive some degree of credit from it.

6th. That the main act or transaction is not, in every case, necessarily confined to a particular point of time, but whether it is so or not depends solely upon the nature and character of the act or transaction. *Lund v. Tyngsborough*, 9 Cush. 41.

Search is made in vain for any decided case, where the principles and tests which regulate and control the admission of such evidence is so satisfactorily stated, and with so much fullness and clearness as in that case. *Meek v. Perry*, 36 Miss. 261.

**d. Expressions of Pain, Suffering, etc.**—Declarations of the injured party, though plaintiff, at time of disaster, explaining the occurrence and its effects upon him, are competent in his own favor, if part of the *res gestæ*. *Brownwell v. Pacific R. Co.* 47 Mo. 239; *Frink v. Coe*, 4 G. Greene, 555. Declarations subsequent to the act are also deemed admissible. *Com. v. M'Pike*, 3 Cush. 181; *Harriman v. Stowe*, 57 Mo. 93. *Contra*, see *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185.

A formidable array of authorities establish the proposition that all declarations of pain, suffering, actions, groans, outcries, expressions of pain and distress at the time of such suffering, may be given in evidence of the injured person's favor, even though after the commencement of the action. *Matteson v. New York Cent. R. Co.* 35 N. Y. 487, 62 Barb. 364; *Murphy v. New York Cent. R. Co.* 66 Barb. 125; *Barber v. Merriam*, 11 Allen, 322; *Kent v. Lincoln*, 32 Vt. 591; *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Phillips v. Kelly*, 29 Ala. 628; *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 N. Y. 344; *Baker v. Griffin*, 10 Bosw. 140; *Brown v. New York Cent. R. Co.* 32 N. Y. 597; *Gray v. McLaughlin*, 26 Iowa, 279.

Evidence of exclamations of pain made by a person immediately on returning home an hour or two after receiving personal injuries is admissible on the question of damages. *Smith v. Dittman* (C. P.) 34 N. Y. S. R. 303.

When such declarations are evidence, they may be proved by any witness who heard them; they are of greater weight if made to and proved by a medical attendant. *Howe v. Plainfield*, 41 N. H. 135; *Perkins v. Concord R. Co.* 44 N. H. 223.

In all instances where it is pertinent to show the bodily or mental feelings of a person, the natural expressions of such feelings made at the time in question are, as to the facts in issue, regarded as original evidence. Such expressions usually furnish satisfactory evidence, and it is the province of the jury to determine what degree of credence should be accorded them. *Phillips v. Kelly*, 29 Ala. 628; *Hyatt v. Adams*, 16 Mich. 180; *Caldwell v. Murphy*, 11 N. Y. 416.

*Judge Denio*, in the case last cited, says: "It is one of the natural concomitants of illness and of physical injuries for the sick or injured person to complain of pain and distress. A complaint, it is true, may be simulated, but it is generally real. I think such evidence is admissible from the necessity of the case, and that it may safely be left to the jury in connection with the other evidence touching the alleged sick or injured person's condition."

In a somewhat similar case, *Lord Ellenborough* said: "If inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patient at the time, this must be evidence. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries and must be resorted to from the very nature of things." *Aveson v. Kinnaird*, 6 East, 188.

**e. Illustration of the Rule.**—An apt phase of illustration may be found in a New York case, decided in 1866. An action was brought by a husband against a railroad company for damages sustained from injuries inflicted upon his wife. This claim was based principally upon the hypothesis that by the concussion sustained by his wife in the defendant's car, she received an internal injury, which so affected her as to produce a partial paralysis, seriously and permanently impairing her health and physical capacity, rendering her unable to labor, or even to walk without assistance, and thereby subjecting him to great pecuniary loss and expense. In support of that theory, the plaintiff introduced testimony tending to show the nature and cause of the accident, the force of the concussion, its immediate and visible effects on his wife, and that previous to

the accident she attended actively and efficiently to her household affairs, although she was subject to occasional sickness, but that since the accident she had lost to a great extent the use of her limbs, her general health was greatly impaired, and she was unable to do any work.

This outline of the case gives a general view of the points contested on the trial and the character of the testimony by which the plaintiff attempted to establish his claim. All the questions suggested in the points submitted by the counsel for the appellants, as to the credibility of the plaintiff's witnesses, and the probability of their statements, of course belonged to the jury, and were conclusively disposed of by them. Assuming that the witnesses were truthful, and that their testimony established the fact that she was suffering from an affection of the spinal column, which tended to paralysis, it was impossible to prove by direct evidence, and with absolute certainty, from what cause the affection proceeded. Something was necessarily left to inference; not a merely speculative, but a rational inference based upon all the circumstances of the case. The testimony, including that of the physicians, authorized the jury to find that, previously to the accident, she was free from all disease of the spine, tending to paralysis; that immediately thereafter, a disease of that nature began to be exhibited, and was subsequently manifested in increased force until the time of the trial; that on the occasion of the accident, she received a jar or blow that was sufficient to produce such disease; and that no other cause was shown to which it could be reasonably ascribed.

It became material to show the bodily health and condition of the wife from the time of the accident to that of the trial. Upon that point, the most satisfactory species of testimony was that of physicians, who saw and examined her at different times during that period with a view to ascertaining her condition; her complaints and representations of pain and suffering, together with her appearance and conduct, necessarily formed the basis of their judgment. Such complaints and representations are original testimony, and not hearsay. This is the case notwithstanding the examinations referred to were made by physicians after the suit was commenced, and with a view to their testifying therein as to the result of their examinations. It does not appear that the patient knew that such was their object, and if she did know it, the jury were to judge whether her representations were false, or her testimony collusive.

*Werely v. Persons*, 28 N. Y. 344; *Brown v. New York Cent. R. Co.* 32 N. Y. 600; *Matteson v. New York Cent. R. Co.* 35 N. Y. 487

**f. Unsworn Statements Generally Excluded.**—Statements made out of court and without the sanction of an oath are dangerous as evidence, and the rights of suitors should not be put in peril by them. The instances are few in which declarations and unsworn statements made out of court have been permitted to be given in evidence as proof of the facts sought to be established. Statements and representations of a sick person of the nature, symptoms and effect of his malady, have been received as original evidence, and especially when made to a medical attendant, to enable him to minister to the patient, have they been regarded as competent evidence, and entitled to weight. There is good reason for their admission when made to the attending surgeon or physician, as upon them, in connection with the manifestations and symptoms of injury or disease, the opinion of the expert is based and the treatment governed. But in every other case the admission of testimony so exceptional, as a departure from the established rules of evidence must be referred to the necessities of the case, and the inability of the party to give a higher and more satisfactory nature. The general rule is that the best evidence of which the fact is susceptible must be adduced, and secondary or inferior evidence will not be received, so long as the higher and better evidence can be had. *Reed v. New York Cent. R. Co.* 45 N. Y. 575.

**g. Corollary to Above.**—As a corollary of the propositions above established, we may infer that complaints and indications of suffering by injured parties on a physical examination requested by opposite party, are admissible (*Quaife v. Chicago & N. W. R. Co.* 48 Wis. 513, 33 Am. Rep. 821); or to his attending physician. *Fay v. Harlan*, 128 Mass. 244, 35 Am. Rep. 372.

The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form part of the facts on which the opinion of an expert as to the conditions of health or disease is founded. *Barber v. Merriam*, 11 Allen, 324.

**h. Statements As to Written Contract Given When Made.**—Familiar principles long regarded as elementary exclude

parol evidence in reference to a written contract. The instrument itself is regarded as the most certain memorial of the transaction, and barring the exceptions which we have elsewhere considered, in the absence of fraud or mistake, this written memorial evidences the meaning and intent of the parties. What is done may constitute a part of the *res gestæ*, as well as what is said. Both are entitled to grave consideration in determining the admissibility of evidence, and in many instances it is of great importance to show the contemporaneous acts and declarations that accompany most contractual matters. Under proper circumstances, and in the exercise of due discretion, the acts and sayings of the party are admissible. Great care should be adopted, lest testimony distinctively and pronouncedly hearsay should be confounded with *res gestæ*, *i. e.* the original proof of what has taken place, and which the least reflection will show, may consist of words as well as acts. The application; force and extent of the exception which allows the acts and sayings of parties to a written instrument at the time of its execution to be admitted in evidence, must depend in all instances upon the nature and circumstances disclosed by the transaction. A variety of suggested incidents frequently call for this grade of evidence, and in all instances the discretion of the trial court should regulate the admission of such testimony by a consistent apprehension of all the facts in evidence.

**i. Serious Dissent from Conclusions Reached.**—There has been serious dissent and strenuous opposition to many of the legal conclusions which have been engrafted upon this law of *res gestæ*. Within what confines it is expedient to admit the testimony of statements made at the time of the accident, or what criteria should be adopted as to the lapse of time after the accident, or what circumstances should govern as to the condition, mental or physical, of the declarant, his freedom from restraint, and general environment,—these and various other incidental considerations are always elements to be considered. The most vigorous protest comes from the Supreme Court of Oregon in a recent case, where this entire principle of the *res gestæ* was under review, and as it has many affinities with the principle implicated in this discussion, we will incorporate the following excerpt from the able opinion of Justice Thayer in *Sullivan v. Oregon R. & Nav. Co.* 12 Or. 392, 53 Am. Rep. 364. Its pertinency relates to statements made

after the injury, and it is an able criticism upon *Com. v. M'Pike* 3 Cush. 181, and *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437.

j. **Argument of Mr. Justice Thayer.**—"Such testimony has in many instances been admitted in evidence, and courts have attempted to give reasons for holding it competent. The line of authorities in this country which maintain its admissibility seems to have commenced with the case of *Com. v. M'Pike*, 3 Cush. 184. The courts that have followed the ruling in that case have frequently manifested a sort of hesitancy as to its correctness, but have concluded that such statements were a part of the *res gestæ*, and been content to place their decisions upon that ground.

"That mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the case is susceptible of shall be produced and it leads to uncertainty and doubt. It is very easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gestæ*, but extremely difficult to explain it, and many times wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained, or its nature and quality be ascertained by an accompanying declaration which may be properly regarded as a part of the transaction in which it occurred, but it is never the act itself, nor the mere evidence of it. If a party were to be set upon and wounded, his narration of the circumstances attending the affair, or declarations as to who inflicted the injury, made after the transaction was ended, and his assailant gone, would be no part of the occurrence, it would be only his own account of the affair. None of the class of cases referred to furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some of them that they must have been made at the time the act transpired; but in others, that a considerable time may elapse and they still be such part; that each case must depend upon its own peculiar circumstances and be determined by a sound judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by 'a sound judicial discretion,' that the court before whom the trial is had must judge as to whether the transaction was continu-



ing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony; the court would consider the facts and circumstances surrounding the affair, and determine therefrom as to its competency; but if, on the other hand, it is to be understood that the court is to decide the question in accordance with the judge's notions as to the justice of the particular case, then it is afloat without any chart to direct it; precedents, under that view, would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character which had been adjudicated upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject, as law is, as a rule, applicable to a class of cases which are alike in principle.

"The question is too important to be left to such uncertainty, and there is no occasion for leaving it to be determined by vague speculation. The authorities upon the subject are quite numerous, and are widely different. The Massachusetts cases, with the exception of the one referred to, have generally held to a reasonable and consistent rule upon that branch of evidence. They have repudiated the notion that the admission of such declarations is left to the discretion of the presiding judge, and admit them only when they are calculated to explain the character and quality of the act, and are so connected with it as to derive credit from the act itself, and to constitute one transaction. *Lund v. Tyngsborough*, 9 Cush. 41. This appears to me to be as liberal a rule as any court can consistently with the rules of evidence sanction, and I think it very doubtful whether our courts, under certain provisions of our statute, would have any right to permit the introduction of declarations of parties as evidence except under the condition of circumstances above referred to."

The limit of extreme indulgence was reached in the Mosley case. That decision and all of a kindred nature cannot, in my opinion, be maintained without doing violence to the law of evidence. It cannot be established by any system of logic that can be employed, that the statements and declarations of a party to a transaction made after it has ended are a part of it.

The case of *Reg. v. Buldingfield*, 14 Cox's Crim. Cas. 341, is an extreme case upon the other side, and goes much further than would be needed to justify the exclusion of these declarations. That case was decided by Lord Chief Justice Cockburn, after

consulting with Field and Manesty, *JJ.*, and aroused much discussion and criticism in England. *Bedingfield's Case*, 14 Am. L. Rev. 817.

In dealing with judicial evidence of all kinds, ignorance dogmatizes, science theorizes, and sense judges. The stream and even the source of justice may be poisoned by causes irrespective of the imbecility of laws, of the blunderings of tribunals. It occurs to me that courts at *nisi prius* would have but little difficulty in determining when the statements of a party in such cases were admissible as a part of the *res gestæ*, or incompetent upon the ground that they were only hearsay, if they would consider whether the transaction to which they were relating were continuous when they were made, or terminated at the time, and make that the test of the matter; and I believe that much of the embarrassment they labor under in applying the rule in such cases has arisen in consequence of an attempt that has frequently been made to stretch the *res gestæ* doctrine to an unnatural extent in order to suit some supposed meritorious case, and which has led to the great diversity of decisions and confusion of the law upon that subject. *Sullivan v. Oregon R. & Nav. Co.* 12 Or. 392, 53 Am. Rep. 364.

k. **Summary of Conclusions Reached.**—Summarizing the conclusions upon this subject, we may affirm that to make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction. *Rockwell v. Taylor*, 41 Conn. 55.

Apparent abuses resulting from receiving descriptive declarations of pain in negligence cases, has led to a reconsideration of the rule; and the better opinion now is that a party seeking to recover damages on account of his own suffering cannot give in evidence, in his own behalf, his own descriptive declarations of suffering, as distinguished from apparently spontaneous manifestations of the distress. Abbott, Trial Brief, 138.

1. **The General Rule.**—The general rule is, that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize, and must so harmonize as to be

obviously one transaction, and where complications are introduced incident to the mutual relations involved by the relations of agency, the declarations made by such agents in general bind the principal. Where his acts will bind, his statements and admissions respecting the subject matter of those acts will also bind the principal if made at the same time, and so that they constitute a part of the *res gestæ*. To be admissible they must be in the nature of original and not hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction pending at the very time.

This seems to be the final attitude of judicial sentiment on this subject. Whatever conclusion or result the courts of last resort may reach as regards this topic, that result is certain to be of great importance to the law of evidence.

*Res gestæ* in its ramification is invading every principle of this law. The constant tendency of the courts to admit all testimony that can elucidate or unravel the mysticism of any transaction—the declared intention of many of our jurists to sift the component parts forming the fabric of litigation, and to expose every feature delineated or suggested by the case, in order to reach the whole merit of the transaction, these tendencies with others equally potential are investing the topic with increasing interest. I cannot abandon this branch of my subject without briefly adverting to some very recent decisions, which fortify and emphasize the positions I have taken in the text.

**m. Recent Decisions.**—The Indiana Supreme Court, in a decision rendered in 1889, outlines its opinion as to *res gestæ* as follows: Declarations which are the emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntary and spontaneously made, so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, are admissible as part of the act or transaction itself.

Declarations of a brakeman within two minutes after he was thrown under a car while attempting to uncouple it, made while

remaining in the presence of the train and of the alleged defective machinery, which he declared was instrumental in producing his hurt, which caused his death in about six hours afterwards, and before he had been removed from the spot, are admissible as part of the *res gestæ*. *Louisville, N. A. & C. R. Co. v. Buck*, 2 L. R. A. 520, 116 Ind. 566.

The Supreme Court of Georgia had decided in the previous year that in an action against the railway company to recover damages for personal injury, declarations made by plaintiff half an hour after the accident as to the manner of his leaving the train and receiving the injury, were inadmissible as part of the *res gestæ*. *Savannah, F. & W. R. Co. v. Holland*, 82 Ga. 257. Here we closely approach the confines, at least, of very decided antagonism to the Indiana decision last cited, and the decision of the Georgia court seems repugnant to the principle formulated in an earlier case (1884) where the injured person was a child fourteen years old, who died from the injury. Her declarations made half an hour after the injury was received were admitted in evidence upon the ground that they were free from suspicion, this court saying: "It is scarcely credible that this little girl while enduring such excruciating pain—perhaps torture would not be too strong a word to characterize it—from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage of gain, or from any other ulterior purpose." *Augusta Factory v. Burnes*, 72 Ga. 218.

Upon a subsequent consideration of that case, the same court, in *Augusta & S. R. Co. v. Randall*, 79 Ga. 311, held the declarations of a mature woman not more remote in time inadmissible. The courts say in reference to the Augusta factory action: "That case must rest alone upon its own peculiar facts, and will not be extended beyond them. The proximity of time in which declarations are made to the main transaction are not the only test of their admissibility in evidence, but they must also be free from all suspicion of device or afterthought."

A valuable contribution to the literature of this discussion, is found in the case of *Chicago W. D. R. Co. v. Becker*, 128 Ill. 545. The action was against a city railway company to recover damages for personal injury to plaintiff's intestate, a boy, causing his death. It was claimed that the boy was thrown from a car and run over. After the boy had got up and walked to the sidewalk and sat down, he stated, in answer to a question as to what

was the matter, that the conductor threw him off the car. These statements were admitted in evidence. Judge McGruder, writing for reversal, says: "We think that the admission of proof as to what was said by the deceased, under the circumstances thus detailed, was erroneous. The declarations were not a part of the *res gestæ*. They were not made at the time of the accident, nor did they explain or characterize the manner in which the accident occurred. They were not concurrent with the injury, nor uttered so contemporaneously with it as to be regarded as a part of the principal transaction. They were made after the injury was received and were merely narrative of what had taken place. They were spoken by the deceased as his answer, when he was asked, 'What was the matter?' The true inquiry according to the authorities, is whether the declaration is a verbal act illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or part of a history of a completed past affair. In the one case it is incompetent, in the other it is not. *Mayes v. State*, 64 Miss. 329; *Waldele v. New York Cent. & H. R. R. Co.* 95 N. Y. 274; *Lauder v. People*, 104 Ill. 248, and other cases of a recent date."

The Pennsylvania Supreme Court follows the decisions in New York and Illinois holding that declarations as to a defect in an engine, made by officers of a railroad company, after an accident resulting in the death of one of the company's employees, constitute no part of the *res gestæ*, and are not admissible as evidence on the part of the plaintiff in an action against the company for negligently causing such death, when not offered in contradiction of prior testimony of such officers. *Erie & W. V. R. Co. v. Smith*, 125 Pa. 259. Mr. Justice Green, who delivered the opinion in the above entitled case, says that the rule of law upon this subject of *res gestæ*, "is so perfectly familiar that it is not necessary to refer to the authority."

The Michigan Supreme Court is not as hardy in its confidence, and employs the phrase "is perhaps admissible," in lieu of Mr. Justice Green's "perfectly familiar" expression, and in an action against a street railway company for damages for personal injury, a conversation between the car driver and the company's superintendent as to the cause of accident was ruled admissible as part of the *res gestæ*, but a conversation between the same parties as to a past transaction, which was not part of the *res gestæ*, was ex-

cluded (*Wormsdorf v. Detroit C. R. Co.* 75 Mich. 472); and *Keyser v. Chicago & G. T. R. Co.* 66 Mich. 390, sustains the same view.

The Missouri Supreme Court admires the reasoning in *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437, and adopts the conclusion of the United States Supreme Court, rather than follow the Pennsylvania case. In *Leahey v. Cass Ave. & F. G. R. Co.* 97 Mo. 165, it is held that declarations to be part of the *res gestæ* need not be coincident in point of time, with the main fact to be proven. It is sufficient if the two are so nearly connected that the declaration can, in the ordinary course of events, be said to be the spontaneous exclamations of the real cause, or if a subsequent declaration and the main fact at issue, taken together form a continuous transaction, the declaration is admissible; but a mere subsequent declaration is not of itself a sufficient connecting circumstance to make it admissible.

Declarations of party injured by railway train as to how he received the injury, made when he was first picked up at the scene of the accident, surrounded by parties who witnessed it, are admissible as part of the *res gestæ*, but his declarations made from five to twenty minutes afterwards, when he had been removed fifty or seventy-five feet and placed on a cot, are inadmissible.

The question of time is of great importance in determining the admissibility of declarations. If made instantaneously with the occurrence they seek to characterize, the tendency is to admit them; but where these declarations are in their nature narrations of a past occurrence, are so remote from the incident they are supposed to illustrate as to be historical or rather narrative, then and in that event the weight of authority is in favor of their exclusion.

In *Harriman v. Stowe*, 57 Mo. 93, the plaintiff was injured about noon. Her physician called between one and four o'clock of the same day, when she stated to him how she got hurt, namely by falling through a trap door. This statement the physician related on the witness stand, and this court held the evidence competent, because part of the *res gestæ*, saying that the declaration and accident formed connecting circumstances.

The case of *Brownell v. Pacific R. Co.* 47 Mo. 240, was a suit instituted to recover damages for the death of the plaintiff's husband. There the declaration of Brownell, in reference to the switch, it is said "grew directly out of and was made immediately

after the happening of the fact," and it was held that the declaration was competent evidence for the plaintiff.

The case cites with approval *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437, which was an action on a policy of insurance. To show that the death of the insured was caused by an accident, the wife testified that her husband left his bed between twelve and one o'clock; that when he came back he said he had fallen down the back stairs and nearly killed himself. The evidence of the son was to the same effect; he also testified further, that the day after the fall his father said he felt badly, etc. This evidence was held to be competent for two purposes: 1. To show bodily injuries and pain; and 2. To prove that deceased fell down stairs. In respect of the first, it is said such evidence must relate to the present and not the past. Anything in the nature of narration must be excluded. As to the second, it is said in substance that generally the declarations must be contemporaneous with the events; yet the rule is not of universal application. Further on it is said: "Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress."

That court as well as this, in the cases last cited, quote approvingly from *Hanover R. Co. v. Coyle*, 55 Pa. 396, where a peddler's wagon was struck and injured by a locomotive. The court said: "We cannot say that the declaration of the engineer was not a part of the *res gestæ*. It was made at the time,—in view of the goods strewn along the road by the breaking up of the boxes,—and seems to have grown directly out of and immediately after the happening of the fact."

*Adams v. Hannibal & St. J. R. Co.* 74 Mo. 553, was an action by the plaintiff to recover damages for the death of her husband. Plaintiff proved by one witness that after the deceased was struck and after the train had stopped, two trainmen, whom the witness took to be the fireman and engineer, came up, and one of them said to the other, "If you had stopped the train when I told you, you would not have killed him." The other replied, "It cannot be helped now; it is too late." This court after reviewing various authorities stated its conclusion as follows: "Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction and illus-

trative of its character, or merely a subsequent narrative of how it occurred, or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury."

This case was cited as an authority in the subsequent case of *Devlin v. Wabash, St. L. & P. R. Co.* 4 West. Rep. 54, 87 Mo. 545, but that case was quite different in its facts, as will be seen as to the following statement made therein: "It does not appear that these statements made by the section foreman to the foreman of the roadhouse were made while the foreman was transacting the business of the defendant."

*Vicksburg & M. R. Co. v. O'Brien*, 119 U.S. 99, 30 L. ed. 299, was a personal damage suit. A witness was permitted to testify that between ten and thirty minutes after the accident he had a conversation with the engineer in charge of the locomotive, and that he, the engineer, said the train was moving at the rate of eighteen miles per hour. The court held that this evidence should have been excluded, four of the justices dissenting. The majority opinion is put upon the ground that the declaration did not accompany the act from which the injury arose, that it was a mere narration of a past occurrence, and therefore not a part of the *res gestæ*. The dissenting justices say: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in the presence of the injured parties, and while surrounded by excited passengers." The modern doctrine has relaxed the ancient rule, that declarations to be admissible as part of the *res gestæ* must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it."

**n. Contemporaneous Declarations, when Admissible.**—Declarations made contemporaneously with or immediately preparatory to a particular litigated act, which tend to illustrate and give character to the act in question, are admissible as part of the *res gestæ*. Where, therefore, in an action to recover for an alleged breach of a contract of hiring, the disputed question is whether the hiring was for a year or for an indefinite period, a letter written by the defendants to the plaintiff on the day before the



hiring, containing a declaration that the writers desired to see the plaintiff the next day, with a view of securing his services for the coming year as foreman, though not received by the plaintiff till the day after the contract was completed, is admissible in evidence as corroborative of the plaintiff's version of the contract. *Hinchcliffe v. Koontz*, 121 Ind. 422.

**o. Argument of Mr. Justice Field.**—The United States Supreme Court has enlarged the scope of this entire doctrine, relating to the *res gestæ*, by an admirable decision in the Mosley case. The adverse criticism upon that decision has been noted, and yet the same high tribunal in a very recent case, declined to recede from its position, and gave strength and entablature to its previous position, in language that unmistakably indicates the present drift of authority. *Mr. Justice Field*, in the dissenting opinion appended to *Vicksburg & M. R. Co. v. O'Brien*, develops the present status of *res gestæ*, at least as it is understood by himself and his associates on the supreme bench of the United States. He says:

“The modern doctrine has relaxed the ancient rule, that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it.

“The case of the *Hanover R. Co. v. Coyle*, 55 Pa. 402, is in point. There it appeared that a peddler's wagon was struck by a locomotive and the peddler was injured; and the question was as to the admissibility of the declaration of the engineer that the train was behind time, to show carelessness and negligence. The Supreme Court of Pennsylvania held it admissible; ‘we cannot say’ said the court ‘that the declaration of the engineer was no part of the *res gestæ* ;’ it was made at the time in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself.’

“What time may elapse between the happening of the event in

respect to which the declaration is made, and the time of the declaration and yet the declaration be admissible must depend upon the character of the transaction itself." See dissenting opinion of *Mr. Justice Field*, appended to *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299.

### § 213. Declarations or Entries Made in the Course of Business or Professional Duty by Parties Since Deceased.

**a. The General Rule.**—There is a rule which admits written entries, made by deceased persons as evidence, even though not made against their interests, provided that in addition to a peculiar and personal knowledge of the facts, and the absence of all interest to pervert them, the entries appear to have been made in the ordinary course of official, professional or other business or duty, and to have been immediately connected with the transactions to which they relate. And under such circumstances, it would appear that, upon general principles, there is no sound distinction between written entries and verbal declarations. The entries which are made in books of account will be noticed in a subsequent place. 3 Wait, Law & Pr. (5th ed.) 436.

Entries and memoranda, made by persons since deceased, in the ordinary course of professional and official employment, are competent secondary evidence of the facts contained in them, where they had no interest to misrepresent or misstate them (*Nicholls v. Webb*, 21 U. S. 8 Wheat. 326, 5 L. ed. 628). They are admitted from necessity.

**b. Its Limitations.**—The principle of the rule is limited to those cases only in which the entry was made in the ordinary and regular course of business, and it does not extend to entries, which though made in the course of business, include independent matters which are not necessary to the performance of the duty by the person who made the entry. This view is sustained by a formidable array of authority. *Prescott v. Hayes*, 43 N. H. 593; *Hicks v. Cram*, 17 Vt. 449; *Ringo v. Richardson*, 53 Mo. 385; *Litchfield Iron Co. v. Bennett*, 7 Cow. 234; *Trammell v. Hudmon*, 78 Ala. 222; *Foster v. Brooks*, 6 Ga. 287; *Coleman v. Frazier*, 4 Rich. L. 146; *Pearce v. Jenkins*, 10 Ired. L. 355; *Blattner v. Weis*, 19 Ill. 246; *St. Clair v. Shale*, 20 Pa. 108; *Stair v. New York Nat. Bank*, 55 Pa. 364; *Taylor v. Gould*, 57 Pa. 152; *Bird v. Hueston*, 10 Ohio St. 418.

We may observe however, that the entries must be made

contemporaneously with the occurrence of the events recorded, and it should be remembered that hearsay evidence does not lose its identity as such by being the subject of an entry in an account book (opinion of Hunt, *J.*, in *Churchman v. Lewis*, 34 N. Y. 444).

*Chief Justice* Church in the case decided in 1874 held, that entries made by the discount clerk of a bank can only be proved by the clerk making them, if alive and within the State; and the receiving in evidence statements of other witnesses, not made from personal knowledge, but from entries not thus verified, is error, adding: "The rule is a wise one, and we are not at liberty to overlook a departure from it, even if its application is unimportant. The precedent would be injurious." *Ocean Nat. Bank v. Carll*, 55 N. Y. 440.

**c. Matters Provable in Reference to Declarations.**—The agitation and controversy that has characterized this question of relevancy in so far as it is applicable to statements made by deceased persons, has been set at rest in the English courts by the provisions incorporated in Stephen's Digest, art. 135.

The perfect applicability of these well recognized rules will give pertinency and suggestion to their introduction here, in manner following:

Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under articles 25–32, both inclusive, or any deposition is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness, and had denied upon cross-examination the truth of the matter suggested.

**d. "Fraud Vitiates all Contracts"—Application of Maxim.**—Fraud will vitiate everything; by which is signified, that no one shall, so far as the law can prevent it, be allowed by his own fraud or that of his agent, to acquire a right, escape a liability or impose an obligation on another.

The law exerts its utmost astuteness to detect and defeat fraud, wherever it may lurk, and whatever form it may assume, or device it may adopt. Fraud, however, must not be presumed, but proved; honesty and good faith being in the first instance presumed, as innocence instead of guilt. And mere suspicion is

not proof; for the existence of fraud must be established by such evidence as satisfies the court or a jury that the presumption of honesty and good faith in the challenged transaction is rebutted and overcome. *McAdams, Landlord and Tenant*, § 71.

It is the just and proper pride of our matured system of equity jurisprudence, that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws or even by the formal judgment of the courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail. *Warner v. Blakeman*, 4 Keyes, 487.

### § 214. Testimony of Former Witness Since Deceased, Absent or Disqualified.

a. **Prevailing Law.**—The prevailing law in this country touching the topic under review is thus expressed: “Where a party has died since the trial of an action, on the hearing upon the merits of a special proceeding, the testimony of the decedent, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony, or any question put to him.” *Bliss, N. Y. Code Civil Procedure*, § 830.

This is the manifest expression of legislative enactment touching this subject in most of our states. It is a code provision, of very wide acceptance.

*Sir James Stephen* gives expression to the principle embodied in the New York Code, *supra*, in art. 32, of his Digest.

The language employed is as follows: “Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or is mad, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or in civil, but not, it seems, in criminal cases, is out of the jurisdiction of the court, or perhaps in civil, but not in criminal cases, when he cannot be found.

“Provided in all cases:

“(1) That the person against whom the evidence is to be given

had the right and opportunity to cross-examine the declarant when he was examined as a witness.

“(2) That the questions in issue were substantially the same in the first as in the second proceeding.

“Provided also:

“(3) That the proceeding, if civil, was between the same parties or their representatives in interest.

“(4) That, in criminal cases, the same person is accused upon the same facts.

“If evidence is reduced to the form of a deposition, the provisions of art. 90 apply to the proof of the fact that it was given.

“The conditions under which depositions may be used as evidence are stated in articles 140-142.”

The decisions under these sections scarcely justify the expression of any confident opinion as to the amount of liberality with which their language will eventually be construed, by the state and federal courts. The narrow rules of interpretation which have been promulgated by one or two of the judges, with reference to this statute, are calculated to excite a reasonable fear, lest an equally strict construction should be applied, now that the rule, after repeated modifications has assumed its present form; but on the other hand, it cannot be denied that the subject is now far better understood than it formerly was, and that even judges are beginning to discover that substantial justice is of more real importance than mere technical precision.

**b. Opinion of New York Court of Common Pleas.**—The New York Common Pleas passed upon this subject at General Term in 1881, and the entire bench concurred in the opinion of *Mr. Justice Daly* who wrote for reversal. This decision establishes the principle that a party who has been examined in the first trial, and who is rendered incompetent by the death of his adversary, before the second trial, may have his testimony given in such former trial read at any subsequent trial. *Judge Daly* says: “There is no substantial reason why the testimony taken in such a trial should not be read. The party was on the stand and could have been cross-examined, and the same opportunity for scrutiny and for contradiction existed as if the jury had agreed upon a verdict. The objection taken upon appeal that the testimony cannot be read by the stenographer who took it down on the former trial from his notes, but must be produced in the form of depositions

reduced to writing and subscribed by the party, is not good. Such a rule would exclude all testimony taken in the manner authorized by law, and render the code inoperative." *Lawson v. Jones*, 61 How. Pr. 424.

c. **Person who Heard may be Sworn.**—The proof of what the deceased witness swore may be made by any person who heard his testimony, even though he took no minutes of the evidence. *Grimm v. Hamel*, 2 Hilt. 434; *Hutchings v. Corgan*, 59 Ill. 70. An attorney or counsellor or other person, who took minutes upon a former trial, and testifies to their accuracy, may state on a subsequent trial what a deceased witness swore to on a former trial, although such attorney, etc., cannot testify from his mere recollection without a reference to his minutes. *Van Buren v. Cockburn*, 14 Barb. 118; *Huff v. Bennett*, 6 N. Y. 337; *Martin v. Cope*, 3 Abb. App. Dec. 182; *Crawford v. Loper*, 25 Barb. 449. It is sufficient, if upon such examination of his minutes, he can swear from recollection what the evidence was given by the deceased witness. *Ibid.*

d. **Critical Examination of the Rule.**—In the case of the *State v. Rawls*, 2 Nott & McC. 334, this rule was subjected to a critical examination by the constitutional court of South Carolina, and was, as I think, proved to have originated in a misapprehension of the cases of *Doe v. Perkins* and *Tanner v. Taylor*, cited by Phillips in its support. The rule as laid down in Phillips on Evidence is, in substance, that such memoranda may be used to refresh the recollection of the witness, but can have no force as evidence unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates. The commentary by Nott, *J.* upon those cases, shows conclusively that the memoranda as there produced were not the originals, made by the witness at the time the events occurred, but were copies or extracts from such originals taken long before.

This commentary, which is quoted *in extenso* and approved by Cowen, *J.*, in the case of *Merrill v. Ithaca & O. R. Co.* 16 Wend. 596, 12 L. ed. 1207, seems to me entirely just and sound; and I entertain no doubt that Mr. Phillips fell into an error from not discriminating with sufficient care between the original memorandum itself and a mere copy. The subject is treated with much learning and ability in the notes to Phillips' Evidence, by Messrs. Cowen & Hill (note 528, p. 290), where the authorities bearing

upon it are elaborately reviewed; and I fully assent to the principle there stated, "that an original memorandum, made by the witness presently after the facts noted in it transpired, and proved by the same witness at the trial, may be read by him, and is evidence to the jury of facts, the facts contained in the memorandum, although the witness may have totally forgotten such facts at the time of the trial." Nott, *J.*, in *State v. Rawls*, *supra*.

**e. View of Supporting Cases.**—There are various cases, English as well as American, in addition to *State v. Rawls*, and *Merrill v. Ithaca & O. R. Co.* (*supra*), which tend to support this rule. It is quite obvious that the doctrine supposed to be derived from the work of Mr. Phillips would serve in many cases to defeat the ends of justice, and particularly in cases where witnesses are called upon to testify to the language of parties, used upon occasions long previous. It is well known that the efforts of memory are seldom equal to the task of recalling, after any considerable lapse of time, even the exact substance of words and phrases; while it would be comparatively easy, at the time or immediately afterwards, to make an accurate record of their import. To exclude such a record, when shown to have been honestly made, would be to reject the best and frequently the only means of arriving at the truth.

The reasoning in the above cases becomes the more apparent when we consider that the chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath, and of an opportunity to cross-examine the witness. If the witness is gone, no one knows whither, and his place of abode cannot be obtained by diligent inquiry, the case can hardly be distinguished in principle from that of his death; and it would seem that his former testimony ought to be admitted. If he is merely out of the jurisdiction, but the place is known and his testimony can be taken under a commission, it is a proper case for the judge to decide, in his discretion, and upon all the circumstances, whether the purposes of justice will be best served by issuing such commission, or by admitting the proof of what he formerly testified. 1 Greenl. Ev. § 163, and *note*.

**f. Fluctuation of the Rule in Different Jurisdictions.**—The rules which obtain in the various jurisdictions differ somewhat in their scope and character. In all of the states death of the former witness is sufficient to admit his testimony taken on a previous trial.

As to other disabilities there is much difference of doctrine. Mr. Chase, in his annotation on Stephen's Digest, under art. 32, states: "In civil cases New York has thus far held only death sufficient; absence from the jurisdiction or the fact that the witness cannot be found is not enough. *Wilbur v. Selden*, 6 Cow. 162; *Weeks v. Lowerre*, 8 Barb. 530. In Pennsylvania such evidence is received if the witness has died, has become insane, is sick and unable to attend, has lost his memory through disease or old age, or is out of the jurisdiction, or has become incompetent to testify by reason of the death of the opposite party to the suit. *Walbridge v. Knipper*, 96 Pa. 48. In Illinois, death, insanity or the keeping of the witness away by the adverse party, is sufficient. *Stout v. Cook*, 47 Ill. 530. Absence from the jurisdiction is held to be sufficient in California (*Hicks v. Lovell*, 64 Cal. 14); in Michigan, if due diligence has been used to find the witness (*Howard v. Patrick*, 38 Mich. 795; *Mawich v. Elsey*, 47 Mich. 10); but not in New Jersey (*Berney v. Mitchell*, 34 N. J. L. 337); and that, too, even though he cannot be found (*Ibid.*); nor in Vermont Illinois or Iowa, if there has been a lack of diligence to secure his attendance or deposition. *Kellogg v. Secord*, 42 Mich. 318; *Slusser v. Burlington*, 47 Iowa, 300; *Cassady v. Trustees of Schools*, 105 Ill. 560. Sickness which renders the witness unable to attend is sometimes held sufficient. *Chase v. Springdale Mills Co.* 75 Me. 156. See *Berney v. Mitchell*, 34 N. J. L. 337-341; *Howard v. Patrick*, 38 Mich. 795."

**g. Views of Judge Sharswood.**—In the midst of these contradictory views, it is refreshing in the interest of uniformity to note the vigorous language of Judge Sharswood, than whom no more eminent authority exists: "Though we have no express opinion upon the subject, it seems clear upon principle that the deposition or testimony of a witness formerly taken in the same cause can be read in evidence, showing that he is sick and unable to attend, insane, or in such a state of senility as to have lost his memory of the past, equally as where he is dead or out of the jurisdiction. The evidence that Phillips Smyser fell within the category of loss of memory and general mental incapacity from old age was very ample. Nor was it necessary to have him in court for examination. It would have been a painful and improper exposure, and no rule of law requires it. Besides, he would not have understood the meaning of the subpoena—would not have attended, perhaps,



voluntarily—and an attachment against him for contempt would have been entirely out of the question. It was abundantly proved that at the time of the taking of the deposition he was in possession of his memory and reason; it was therefore rightly received.” *Emig v. Diehl*, 76 Pa. 373.

A stenographer's report of the evidence given by a deceased witness at a former trial has been held inadmissible, although the witness, being dumb, gave his testimony by signs, which the stenographer's report describes and translates. *Quinn v. Halbert*, 57 Vt. 178.

Such testimony must be proved by parol, not by a bill of exceptions. *Stern v. People*, 102 Ill. 540. But such evidence may be proved by the judge who presides at the first trial, who may also prove that such testimony was preserved in a bill of exceptions signed by him. *Corby v. Wright*, 9 Mo. App. 5. As to proof of shorthand notes when reporter is dead, see *People v. Qurise*, 59 Cal. 343.

**h. The Prevailing Law.**—The prevailing law in this country touching the topic under review is thus expressed: Where a party has died since the trial of an action, on the hearing upon the merits of a special proceeding, the testimony of the decedent or of any person who is rendered incompetent by the provisions of the last section, taken and read in evidence at the former trial or hearing, by either party, subject to any other legal objection to the competency of the witness, or to any legal objection to his testimony or any question put to him.

This is the manifest expression of legislative construction in many of our states.

There is no substantial reason why the testimony taken in such a trial should not be read. The party was on the stand and could have been cross-examined, and the same opportunity for scrutiny and for contradiction existed as if the jury had agreed upon a verdict.

The objection taken on appeal that the testimony cannot be read by the stenographer who took it down on the former trial, from his notes, but must be produced in the form of depositions reduced to writing and subscribed by the party, is not good. Such a rule would exclude all testimony taken in the manner authorized by law, and render the code inoperative. *Lawson v. Jones*, 61 How. Pr. 424; *State v. Johnson*, 12 Nev. 121; *Juccard v. Anderson*, 37 Mo. 91.

**i. Precise Language Need Not be Proved.**—It is not necessary to prove the precise language of a deceased witness. To hold otherwise would, in most instances, exclude this class of secondary evidence, and in so far defeat the ends of justice. Where a stenographer has not been employed, it can rarely happen that anyone can testify to more than the substance of what was testified by the deceased, especially if the examination was protracted, embraced several topics, and was followed by a searching cross-examination. It has been well said, that if a witness in such a case, from mere memory, professes to be able to give the exact language, it is a reason of doubting his good faith and veracity. Usually there is some one present who can give clearly the substance, and that is all the law demands. To require more would in effect abrogate the rule that lets in the reproduction of the testimony of a deceased witness. The uncertainty of human life renders the rule, as we have defined it, not unfrequently of great value in the administration of justice. The right to cross-examine the witness when he testified shuts out the danger of any serious evil, and those whose duty it is to weigh and apply the evidence will always have due regard to the circumstances under which it comes before them, and rarely overestimates its probative force.

**j. Use of Notes by Witness.**—The living witness may use his notes taken contemporaneously with the testimony to be proved, in order to refresh his recollection, and thus aided, he may testify to what he remembers; or if he can testify positively to the accuracy of his notes, they may be put in evidence. *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101. The opinion is by *Mr. Justice Swain*.

**k. Miscellaneous Rulings on the Subject.**—Parol evidence of what witness swore to on former trial between the same parties, upon the same issue, is admissible only where the witness is dead, insane, beyond the seas or has been kept away by the contrivance of the other party. *Drayton v. Wells*, 1 Nott & McC. 409, 9 Am. Dec. 718.

Testimony of an interested witness, since deceased, cannot be proved on a second trial by the party in whose favor he was interested, although he was the latter's witness on the former trial. *Crary v. Sprague*, 12 Wend. 41, 27 Am. Dec. 110.

Testimony of a deceased witness given on a previous trial is admissible even in a criminal case. *United States v. Macomb*, 5

McLean, 289; *State v. De Witt*, 2 Hill, L. 282, 27 Am. Dec. 371; *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608.

Deceased witness's whole testimony, in his own words, must be proved, and not merely the substance of what he swore to. *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *Corey v. Janes*, 15 Gray, 545; *Yale v. Comstock*, 112 Mass. 269; *Warren v. Nichols*, 6 Met. 267; *Woods v. Keyes*, 14 Allen, 238.

It is held, on the contrary, that it is sufficient to prove substantially what the deceased witness said. *Iglehart v. Jernegan*, 16 Ill. 520; *United States v. Macomb*, 5 McLean, 286; *Garrott v. Johnson*, 11 Gill & J. 173, 35 Am. Dec. 272; *Black v. Woodrow*, 39 Md. 221.

He must give the whole substance of what deceased witness swore to, or testimony is inadmissible. *Gildersleeve v. Caraway*, 10 Ala. 260, 44 Am. Dec. 485.

Testimony of a deceased witness at a former trial of the action may be given in evidence. *Waters v. Waters*, 35 Md. 539; *Watson v. Lisbon Bridge Proprs.* 14 Me. 201, 31 Am. Dec. 49.

Minutes of testimony of a deceased witness, on former trial, taken by one who states that he tried to take down all that the witness said, not the substance, is admissible, although the party will not swear he took down every word. *Clark v. Vorce*, 15 Wend. 193, 30 Am. Dec. 53; *Merrill v. Ithaca & O. R. Co.* 16 Wend. 598; *Huff v. Bennett*, 6 N. Y. 337; *McIntyre v. New York Cent. R. Co.* 37 N. Y. 291; *Crawford v. Loper*, 25 Barb. 454.

Evidence of what a deceased witness swore to in another and different action is inadmissible. *McMorine v. Storey*, 4 Dev. & B. L. 189, 34 Am. Dec. 374.

Parol evidence of what witness swore to on former trial is not admissible, where witness is present but has forgotten the facts to which he formerly testified. *Drayton v. Wells*, 1 Nott & McC. 409, 9 Am. Dec. 718. For further information on this subject, see note appended to *Ruch v. Rock Island*, *supra*.

A letter written more than thirty years ago belongs to the class of instruments known as the ancient documents, and is presumed to have been written by the person by whom it purports to have been written; and where both persons addressed and writer are dead, is admissible without further proof of its authenticity. *Bell v. Brewster*, 9 West. Rep. 429, 44 Ohio St. 690.

## § 215. Proof of Ancient Documents.

**a. When Proof of Execution Unnecessary.**—It is a rule that if an instrument is thirty years old, it may be admitted in evidence without any proof of its execution; such instrument is said to prove itself. 2 Phil. Ev. (6th Am. ed.) 203, citing *Doe v. Burdett*, 4 Ad. & El. 19; *Rex v. Farrington*, 2 T. R. 471; Bull. N. P. 255.

A deed or instrument thirty years old or upwards, purporting to be a conveyance of property, real or personal, is sufficiently corroborated to be read without further assurance of authenticity, by showing possession of the thing it assumes to convey has gone along and been held in accordance with its provisions. So far the cases, both English and American, seem entirely agreed. *Jackson v. Laroway*, 3 Johns. Cas. 283, 286, 287, 289; *Jackson v. Blanshan*, 3 Johns. 292, 297, 298; *Robert's Widow v. Stanton*, 2 Munf. 129, 135; *Thompson v. Bullock*, 1 Bay, 364; *Knob v. Silloway*, 10 Me. 217; *Jackson v. Davis*, 5 Cow. 123; *Hewlett v. Cock*, 7 Wend. 371; *Jackson v. Brooks*, 8 Wend. 426, 431; *Carroll v. Norwood*, 1 Harr. & J. 174; *Owings v. Norwood*, 2 Harr. & J. 96, 106; *Hall v. Gittings*, 2 Harr. & J. 389, 392; *Joce v. Harris*, 1 Harr. & McH. 196; *Middleton v. Mass*, 2 Nott & McC. 55; *Duncan v. Beard*, 2 Nott & McC. 400; *Doe v. Phelps*, 9 Johns. 169, 171; *Doe v. Campbell*, 10 Johns. 475; *Waldron v. Tuttle*, 4 N. H. 371; *M'Gennis v. Allison*, 10 Serg. & R. 199; *Healy v. Moul*, 5 Serg. & R. 181; *Arnold v. Gorr*, 1 Rawle, 223; *Tolman v. Emerson*, 4 Pick. 162; *Barger v. Miller*, 4 Wash. C. C. 283, 284.

A possession of part of the premises covered by the deed under it, is sufficient. *Jackson v. Davis*, 5 Cow. 123, 127, 128; *Jackson v. Luquere*, 5 Cow. 221; *Jackson v. Lamb*, 7 Cow. 431.

If the possession is conformable to the limitations in the deed, it shall be presumed to be under. *Carhampton v. Carhampton*, 1 Irish T. R. 578.

**b. When Necessary.**—A deed appearing to be of the age of thirty years, where no possession has accompanied it, may be given in evidence without proof of its execution, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine. *Jackson v. Laroway*, 3 Johns. Cas. 283, 286, 287; *Hewlett v. Cock*, 7 Wend. 371; *Jackson v. Luquere*, 5 Cow. 221, 225, 226, 227, 228; *Jackson v. Lamb*, 7 Cow. 431; *Jackson v.*

*Christman*, 4 Wend. 277; *Henthorn v. Doe*, 1 Blackf. 157, 163; *Barr v. Gratz*, 17 U. S. 4 Wheat. 213, 4 L. ed. 553; *Clarke v. Courtney*, 30 U. S. 5 Pet. 344, 8 L. ed. 149.

Where an ancient instrument stands uncorroborated by possession, and is not otherwise sufficiently "accounted for," as it is called, some proof of execution is to be adduced. *M'Gennis v. Allison*, 10 Serg. & R. 199.

**c. Law Indulgent as to Proof.**—The law, however, is indulgent in such cases and does not require that complete measure of proof which it demands in respect to more recent transactions. *Bennett v. Runyon*, 4 Dana, 422, 424; *Walton v. Coulson*, 1 McLean, 121; *Stokes v. Dawes*, 4 Mason, 268.

If the subscribing witnesses are living, and not absent or incompetent, they should be called. *Jackson v. Blanshan*, 3 Johns. 292, 297, 298; *Clarke v. Courtney*, 30 U. S. 5 Pet. 319, 344, 8 L. ed. 140, 149; *Tolman v. Emerson*, 4 Pick. 160, 162.

But it is not unusual for the court to presume their death or absence, after the lapse of thirty years or upwards, and save the necessity of search, inquiry, etc. *Hinde v. Vattier*, 1 McLean, 110, reversed on other grounds, 32 U. S. 7 Pet. 252, 8 L. ed. 675; *M'Gennis v. Allison*, 10 Serg. & R. 199; *Winn v. Patterson*, 34 U. S. 9 Pet. 674, 675, 9 L. ed. 270; *Jackson v. Burton*, 11 Johns. 64; *Duncan v. Beard*, 2 Nott & McC. 400, 408; *Knox v. Silloway*, 10 Me. 217; *Bennet v. Robinson*, 3 Stew. & P. 229; *Everley v. Stoner*, 2 Yeates, 122; *Marsh v. Collnett*, 2 Esp. 665; *Doe v. Burdett*, 4 Ad. & El. 1; *Doe v. Deakin*, 3 Car. & P. 402; *Thomas v. Horlocker*, 1 U. S. 1 Dall. 14, 1 L. ed. 17; *Doe v. Oldham*, 8 Barn. & C. 25; *Fetherly v. Waggoner*, 11 Wend. 603.

Phillips says that the rule first above stated requires documents to be produced from their proper place and custody; and in many instances, the circumstances of the instrument having been acted upon, and of the enjoyment of property being consistent with and referable to it, or otherwise, afford a criterion of its genuineness. 2 Phil. Ev. (6th Am. ed.) 204; citing *Fry v. Wood*, Selw. N. P. 540; *Forbes v. Wale*, 1 W. Bl. 532; *Doe v. Owen*, 8 Car. & P. 751; *Doe v. Beynon*, 4 Perry & D. 193; *Governor of Chelsea Waterworks v. Cowper*, 1 Esp. 275; *Ely v. Stewart*, 2 Atk. 44; *Manby v. Curtis*, 1 Price, 232; *Bertie v. Beaumont*, 2 Price, 303; *Wynne v. Tyrwhitt*, 4 Barn. & Ald. 376.

The rule which admits ancient instruments in evidence includes

such only as are valid on their face. *Meegan v. Boyle*, 60 U. S. 19 How. 130, 15 L. ed. 577. Where there has been a great lapse of time, strict proof of a destroyed deed under which parties have claimed, is dispensed with. *Lewis v. Baird*, 3 McLean, 56.

Strict proof of the execution of a deed which is produced is not required where there has been a great lapse of time. *Stoddard v. Chambers*, 43 U. S. 2 How. 284, 316, 11 L. ed. 269, 282.

## § 216. Ancient Possessions and Evidence Thereof by Deed.

a. **English Origin of Rules.**—In considering this particular exception to the rule rejecting hearsay evidence, it may be well to note that most of the legal authority deducible upon this subject is in its very nature of English origin. Muniments of title in this country at least are ordinarily easy of access, and our courts are seldom called upon to consider or interpret an ancient deed. There are exceptions, however, which we will proceed to consider. In *Jackson v. Blanshan*, 3 Johns. 292, the New York Supreme Court held that in order to entitle a will to be read in evidence as an ancient deed, without further proof than its production, it must be at least thirty years old from the death of the testator; for the age of the will must be computed from the time of the testator's death, and not from its date.

Thus where a will was dated in 1770, and a possession of the land was taken under it, and held from 1780 (when the testator died), for 27 years, it was not allowed to be read in evidence, without proof of its execution.

In the note to 1 Greenl. Ev. § 145, after citing the case of *Jackson v. Blanshan*, *supra*, the author says: "But the weight of authority at present seems clearly the other way, and it is now agreed that where proof of possession cannot be had, the deed may be read if its genuineness is satisfactorily established by other circumstances." He cites *Randcliffe v. Parkyns*, 6 Dow. 202; *McKenire v. Fraser*, 9 Ves. Jr. 5; *Doe v. Passingham*, 2 Car. & P. 440; *Barr v. Gratz*, 17 U. S. 4 Wheat. 213, 4 L. ed. 553; *Jackson v. Laroway*, 3 Johns. Cas. 283; *Jackson v. Luquere*, 5 Cow. 221; *Jackson v. Lamb*, 7 Cow. 431; *Hewlett v. Cock*, 7 Wend. 371; *Willson v. Betts*, 4 Denio, 201. Compare also *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Homer v. Cilley*, 14 N. H. 85; *Ridgeley v. Johnson*, 11 Barb. 527; *Dishazer v. Maitland*, 12 Leigh, 524; *Wagner v. Aiton*, 1 Rice, L. 100; *Townsend v. Downer*, 32 Vt. 183; *Shanks v. Lancaster*, 5 Gratt. 110; *Caruthers*

v. *Eldridge*, 12 Gratt. 670; *Nowlin v. Burwell*, 75 Va. 551. *Martin v. Rector*, 24 Hun, 27; *Gainer v. Cotton*, 49 Tex. 101.

**b. Admissibility of Deeds, Subscribing Witness.**—As previously stated, an ancient deed is admissible in evidence without direct proof of execution, if it appears to be at least thirty years old, is found in proper custody, and either possession under it is shown or some other corroborative evidence freeing it from all just grounds of suspicion. *Applegate v. Lexington & C. County Min. Co.* 117 U. S. 255, 29 L. ed. 892; *Barr v. Gratz*, 17 U. S. 4 Wheat. 213, 4 L. ed. 553; *Winn v. Patterson*, 34 U. S. 9 Pet. 663, 9 L. ed. 266; *Stoddard v. Chambers*, 43 U. S. 2 How. 284, 11 L. ed. 269.

A sheriff's deed after more than twenty years' possession is admissible, although the record is not produced. *Burke v. Ryan*, 1 U. S. 1 Dall. 94, 1 L. ed. 51.

A deed sixty-three years old, though not attended by possession where one witness is dead and the other unknown, upon proof of the handwriting of one witness, by a person who had seen many deeds and papers signed by him, is admissible in evidence. *Thomas v. Horlocker*, 1 U. S. 1 Dall. 14, 1 L. ed. 17.

A deed sixty-one years old from S. C. Young to John Holmes was rightfully admitted in evidence as an ancient deed, without proof by the subscribing witnesses or of possession under it, where it was produced from the custody of the grantee's heirs, who, with the grantee had been assessed for and had paid taxes thereon for thirty-three years before the action was brought, and on proof of the genuineness of the signature to the certificate of acknowledgment by the officer now deceased, and that the deed had been recorded more than forty-two years, and also that the land had been known for a still longer time as the "Holmes plantation." *Fulkerson v. Holmes*, 117 U. S. 389, 29 L. ed. 915.

Where a bond purports to have been executed many years before, as strict proof of its execution should not be required as if it was of recent date. *Coulson v. Walton*, 34 U. S. 9 Pet. 62, 9 L. ed. 51.

The rule admitting a will in evidence without proof as an ancient instrument, embraces no instrument which is not valid on its face, and which does not contain every essential requirement of the law. *Meegan v. Boyle*, 60 U. S. 19 How. 130, 15 L. ed. 577.

c. **Views of United States Supreme Court.**—All controversy over this subject has subsided since the decision of the United States Supreme Court. In *Applegate v. Lexington & C. County Min. Co.* 117 U. S. 255, 29 L. ed. 892, *Mr. Justice Woods* writing for reversal expresses the unanimous opinion of the court in the following language: "The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown or some other corroborative evidence of its authenticity freeing it from all just grounds of suspicion. Thus in *Barr v. Gratz*, 17 U. S. 4 Wheat. 220, 4 L. ed. 555, a deed from Craig to Michael Gratz dated July 16, 1784, was offered in evidence, but was not proved by the subscribing witnesses, nor their absence accounted for. Its admission was alleged as error, but this court said that as the deed was more than thirty years old, and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in a prior chancery suit, it was, in the language of the books, sufficiently accounted for, and on this ground, as well as because it was a part of the evidence in support of the decree in that suit, it was admissible without the regular proof of its execution.

"So in *Caruthers v. Eldridge*, 12 Gratt. 670, it was contended by the plaintiff in error that in no case could a paper be admitted in evidence as an ancient deed without proof of its execution, until it was first shown that thirty years' quiet and continued possession of the land had been held under the deed. But the court held, in substance, that an ancient deed may be introduced in evidence without proof of its execution, although possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and as will afford the presumption that it is genuine.

"In *Harlan v. Howard*, 79 Ky. 373, the Court of Appeals states the rule in relation to the proof of ancient deeds, thus: 'The genuineness of such instruments may be shown by other facts as well as that of possession. And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument, when no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled



to it.' See also Viner's Abr. *Evidence* Ab. 5 *Ancient Deeds*, 7; Comyn, Dig. *Evidence* B 2; 1 Greenl. Ev. § 144 and note 1; Stark. Ev. 524; Phil. Ev. Cowen & Hill's notes (3d. ed.) part II. note, 197, page 368, *et seq.*; *Doe v. Passingham*, 2 Car. & P. 440; *Sir Parkyn's Will*, 6 Dow. 202; *Winn v. Patterson*, 34 U. S. 9 Pet. 663, 9 L. ed. 266; *Jackson v. Laroway*, 3 Johns. Cas. 283; *Hewlett v. Cock*, 7 Wend. 371.

"In the case last cited, Judge Nelson, afterwards a justice of this court, said that there was some confusion in the cases in England and New York as to the preliminary proof necessary to authorize an ancient deed to be read in evidence; that possession accompanying the deed was always sufficient without other proof, but it was not indispensable. He approved the decision in *Jackson v. Laroway*, *supra*, which he said had been recognized as law in *Jackson v. Luquere*, 5 Cow. 221, and had undoubtedly in its favor the weight of English authority. These authorities sustain the rule as we have stated it."

### § 217. Ancient Boundaries.

**a. Mr. Justice McLean's Statement of the Rule.**—A further exception to the rule excluding hearsay evidence is found in matters relating to ancient boundaries. In the very nature of the case, such evidence is always admissible, and the prevailing doctrine in this country at least was stated in 1832 by Mr. Justice McLean in *Boardman v. Reed*, 31 U. S. 6 Pet. 328, 8 L. ed. 415.

We excerpt from the opinion: "That boundaries may be proved by hearsay testimony is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force.

"Landmarks are frequently formed of perishable materials which pass away with the generation in which they are made. By the improvement of the country and other causes, they are often destroyed. It is therefore important in many cases that hearsay or reputation should be received to establish ancient boundaries. But such testimony must be pertinent and material to the issue between the parties. If it have no relation to the subject, or if it refer to a fact which is immaterial to the point of inquiry, it ought not to be admitted."

Indeed it may be affirmed that the entire tenor and trend of American adjudication has been in favor of extreme liberality in

the application of evidentiary rules to this subject. It is true that in several states of the Union decisions have been made recognizing the admissibility of the declarations of deceased persons, even though they were statements of particular facts and in regard to mere private boundaries, but many of them, perhaps most of them were admissible on other grounds, either as parts of the *res gestæ* or declarations of parties in possession. We think such is not the preponderant weight of decision. In Massachusetts, where the subject has been much discussed, it is held that to be admissible, such declarations must have been made by persons in possession of land and in the act of pointing out their boundaries. *Bartlett v. Emerson*, 7 Gray, 174; *Daggett v. Shaw*, 5 Met. 223.

And again in *Long v. Colton*, 116 Mass. 414, when it was said that it is an element not to be disregarded, especially where the question is one of private boundaries, that the declaration was made while in the act of pointing out the boundaries of the declarant's land. The declaration derives its force from the fact that it accompanies and qualifies an act, and is thus a part of the act. A similar ruling was made in *Bender v. Pitzer*, 27 Pa. 333.

We will not undertake to review the vast number of decisions of state courts upon this subject. Some things may be deduced from them which, though not universally recognized, are the conclusions to which we think a great majority of them lead. In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons shown to have had knowledge of that whereof they spoke, or persons on the land or in possession of it when the declarations were made.

To be evidence they must have been made when the declarant was pointing out the boundaries or discharging some duties relating thereto. A declaration which is a mere recital of something past is not an exception to the rule that excludes hearsay evidence. Still if a different ruling has been made in a particular State, and has become a rule of property there, applicable to the determination of controversies respecting disputed boundaries, the rule governing the United States District Court would require the application of the law as it obtains in that particular jurisdiction in which the court was sitting, to any case coming before it, and this principle is so well recognized in federal procedure as to dispense with the citation of any authorities in its support.

Hearsay evidence is admitted in questions of boundary to establish old boundary lines, even when private, but it is under restrictions, and the restrictions appear to be the same as those which are recognized elsewhere.

b. **The Case of Bogardus v. Trinity Church.**—The celebrated case of *Bogardus (Anneke Jans) v. Trinity Church*, 4 Paige, 178, 3 L. ed. 394, is an instructive commentary upon this topic, and both illustrates and enforces the contentions of the text.

In ascertaining facts relative to the possession and claim of lands which occurred many years prior to the inquiry, courts receive evidence which would be inadmissible if offered to prove events occurring within the period of the memory of living witnesses.

In such cases the statements of historians of established merit (as to facts of a public and general nature); the recitals in public records, in statutes and legislative journals; the proceedings in courts of justice, and their averments and results, and the depositions of witnesses in suits or legal controversies,—are received as evidence of facts to which they relate, but always with great caution, and with due allowance for its imperfections and its capability of misleading.

§ 218. **As to Ancient Facts, of Public Interest.**—It is a well authenticated principle of the law of evidence that in matters of public and general interest such as the boundaries of counties, of parishes, rights of common, claims of highway, etc., the declarations of deceased persons who may be presumed to have had competent knowledge on the subject, are competent evidence. The law allows facts of this nature to be proved by general reputation, and it is abundantly settled that such declarations, or in a pertinent case an ancient document, both originating *ante litem motam*, are admissible in evidence and entitled to great weight, but in order to guard against fraud, it is an established principle that such declarations, etc., must have been made *ante litem motam*,—an expression which has caused some difference of opinion, but which seems to mean, before any controversy has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit. The value of this species of evidence manifestly depends on the degree of publicity of the matters in question; and also, when in a documentary shape, on the facilities or opportunities which may exist for

substitution or fabrication, such evidence is in general incompetent where it sufficiently appears to have resulted from prejudice or interest in a pending or prospective controversy. Best, Ev. § 497; *Cox v. State*, 41 Tex. 1; *People v. Velard*, 59 Cal. 457; *Shook v. Pate*, 50 Ala. 91; *Crease v. Barrett*, 1 Crompt. M. & R. 919; *Boardman v. Reed*, 31 U. S. 6 Pet. 341, 8 L. ed. 420; *Ellcott v. Pearl*, 35 U. S. 10 Pet. 412, 9 L. ed. 475; *Butler v. Mountgarret*, 7 H. L. Cas. 633; *Murray v. Spencer*, 88 N. C. 357; *Poole v. Peterson*, 9 Ired. L. 180; *Morse v. Emery*, 49 N. H. 239; *Wood v. Foster*, 8 Allen, 24; *Cline v. Catron*, 22 Gratt. 378; *Moul v. Hartman*, 104 Pa. 43; *Casey v. Inloes*, 1 Gill, 430; *Drury v. Midland R. Co.* 127 Mass. 571. See an exhaustive discussion of this subject in *Reg. v. Bedfordshire*, 4 El. & Bl. 535; see also 1 Phil. Ev. (10th ed.) ch. 8, § 3; Tayl. Ev. (4th ed.) pt. 2, ch. 8.

### § 219. Dying Declarations.

#### a. Rule Excluding Hearsay Evidence, Modification of.—

Another and very important infringement of the general rule excluding hearsay testimony is found in the case of dying declarations. In these instances the law very justly indulges the presumption that the near presence of death, and the solemnity usually accompanying that dread hour, are likely to impress any person *in extremis* with all the safeguards usually accompanying the solemnities of an oath; hence it is a rule of very extensive application that dying declarations are admissible in evidence. By far the most important instances in which such testimony is adduced arise in criminal actions, and in a subsequent work this subject will receive the elaboration and analysis its importance demands.

**b. When Admissible.**—The rule as condensed and formulated by *Sir James Stephen* is as follows: "A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant, and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

"Such a declaration is not irrelevant merely because it was in-

tended to be made as a deposition before a magistrate, but is irregular." Stephen, Dig. art. 26.

Dying declarations are not admissible on the trial of civil actions. *Jackson v. Betts*, 6 Cow. 377; *Spatz v. Lyons*, 55 Barb. 476.

**c. Implicated With Res Gestæ.**—Dying declarations are closely implicated with the *res gestæ* in civil cases. In our discussion of the topic last named the subject is carefully reviewed; much contradiction prevails in various jurisdictions as to these admissions, but in that constantly increasing body of cases, which involve actions against railway companies for negligently causing death, the statements of the deceased made subsequent to the accident and before death are in the nature of dying declarations.

It is not always easy to determine when declarations having relation to an act or transaction should be received as part of the *res gestæ*, and much difficulty has been experienced in the effort to formulate general rules applicable to the subject. This much may, however, be safely said, that declarations which were the natural emanations or outgrowths of the act or occurrence in litigation, although not precisely concurrent in point of time, if they were yet voluntarily and spontaneously made so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as necessarily to exclude the idea of design or deliberation, must, upon the clearest principles of justice, be admissible as part of the act or transaction itself. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185; *Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727; *Lund v. Tyngsborough*, 9 Cush. 36; *Augusta Factory v. Barnes*, 72 Ga. 217, 53 Am. Rep. 838; *Travelers Ins. Co. v. Mosley*, 75 U. S. 8 Wall. 397, 19 L. ed. 437; *People v. Simpson*, 48 Mich. 474; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405; *Kirby v. Com.* 77 Va. 681, 46 Am. Rep. 747; *Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519; *State v. Horan*, 32 Minn. 394, 50 Am. Rep. 583; *State v. Ah Loi*, 5 Nev. 99; *Hanover R. Co. v. Coyle*, 55 Pa. 396-402; *Durkee v. Central Pac. R. Co.* 69 Cal. 533, 58 Am. Rep. 562; *Lambert v. People*, 29 Mich. 71; *Hill v. Com.* 2 Gratt. 594; *Jordan v. Com.* 25 Gratt. 945; *Harriman v. Stowe*, 57 Mo. 93; *Entwhistle v. Feighner*, 60 Mo. 215; *Elkins v. McKean*, 79 Pa. 493; *Hart v. Powell*, 18 Ga. 635; *Driscoll v. People*, 47 Mich. 413; *Casey v. New York Cent. & H. R. R. Co.* 78 N. Y. 518; *McLeod v. Ginther*, 80 Ky. 399.

Any other rule would in many instances operate to defeat the accomplishment of justice by excluding evidence of the most trustworthy character. While some of the cases cited above carry the doctrine to its extremest length, they all illustrate and apply the general principles consistent with the conclusions we have heretofore enunciated. *Louisville, N. A. & C. R. Co. v. Buck*, 2 L. R. A. 520, 116 Ind. 566.

**d. Not Generally Competent.**—A dying declaration is not admissible except where the death of the deceased is the subject of a charge of homicide on trial, and the circumstances of the death are the subject of the declaration. *People v. Davis*, 56 N. Y. 96; *State v. Harper*, 35 Ohio St. 78; *Railing v. Com.* 1 Cent. Rep. 205, 110 Pa. 100; *Montgomery v. State*, 80 Ind. 338, 3 Crim. L. Mag. 523, with *note*, collecting recent authorities on their competency and mode of proof in homicide. See Abbott, Trial Brief, § 562.

Another exception to the rule excluding hearsay evidence, which, however, is of more importance in criminal than in civil cases, is made in favor of the declarations of a deceased person made *in extremis*, as to the cause of his death and the person who inflicted the fatal wound; in criminal cases only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations, and never under any circumstances, in civil cases. *State v. Quick*, 15 Rich. L. 342; *Thompson v. State*, 24 Ga. 297; *People v. Vernon*, 35 Cal. 49; *Com. v. Reed*, 5 Phila. 528; *State v. Nash*, 7 Iowa, 347; *Walston v. Com.* 16 B. Mon. 15; *McDaniel v. State*, 8 Smedes & M. 401; *Com. v. Casey*, 11 Cush. 417; *Burrell v. State*, 18 Tex. 713; *State v. Poll*, 1 Hawks (N. C.) 442; *Nelson v. State*, 7 Humph. 542; *Moore v. State*, 12 Ala. 764; *Robbins v. State*, 8 Ohio St. 131; *Bull v. Com.* 14 Gratt. 613; *State v. Center*, 35 Vt. 378; *People v. Knickerbocker*, 1 Park. Crim. Rep. 302; *State v. Arnold*, 13 Ired. L. 184; *State v. Thawley*, 4 Harr. (Del.) 562; *Dunn v. State*, 2 Ark. 229; *Goodall v. State*, 1 Or. 333; *Com. v. Cooper*, 5 Allen, 495. The dying declarations of a person fatally injured by the negligence of another, as to the facts attending the injury, are not admissible against such person in a civil action brought to recover damages for the injury (*Daily v. New York & N. H. R. Co.* 32 Conn. 356. See also *Wilson v. Boerem*, 15 Johns. 286; *Rex v. Mead*, 2 Barn. & C. 608; *Waldele v. New*

*York Cent. & H. R. R. Co.* 61 How. Pr. 350), and this rule is held not to impugn the constitutional right of the accused to be confronted by the witnesses against him, as the Constitution does not alter the rules of evidence, but leaves it to law to determine what a witness, when confronted, shall be allowed to state as evidence (*Walston v. Com.* 16 B. Mon. 15; *Campbell v. State*, 11 Ga. 353; *State v. Price*, 6 La. Ann. 691; *Com. v. Carey*, 12 Cush. 246; *Burrell v. State*, 18 Tex. 713; *People v. Glenn*, 10 Cal. 32; *State v. Nash*, 7 Iowa, 347; *Woodside v. State*, 2 How. (Miss.) 655); but in order to make such declarations admissible, they must have been made while the deceased was actually in danger of death, and under the settled conviction that he was about to die, and that death did actually ensue. *United States v. Woods*, 4 Cranch, C. C. 484; *United States v. Veitch*, 1 Cranch, C. C. 115; *Dunn v. State*, 2 Ark. 229; *People v. Lee*, 17 Cal. 76; *People v. Ybarra*, 17 Cal. 166; *People v. Sanchez*, 24 Cal. 17; *Walston v. Com. supra*; *Brown v. State*, 32 Miss. 433; *People v. Knickerbocker*, 1 Park. Crim. Rep. 302; *Montgomery v. State*, 11 Ohio, 424; *Robbins v. State*, 8 Ohio St. 131; *Brakefield v. State*, 1 Sneed, 215; *Nelson v. State*, 7 Humph. 542; *Lewis v. State*, 9 Smedes & M. 115; *Smith v. State*, 9 Humph. 9; *Logan v. State*, 9 Humph. 24; *State v. Center*, 35 Vt. 378; *Bull v. Com.* 14 Gratt. 613. Lord Denman, in the *Sussex Peerage Case*, 11 Clark & F. 108, laid down the rule as follows: "With regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension at the time, of the danger and of death, such declarations can be received in evidence, and all these things must concur to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is not subject to cross-examination," and the question as to whether these elements existed is to be determined in view of all the circumstances, as the nature of the wound, the declarations of the deceased in that regard, and the sense of impending death incident to his condition. *Sullivan v. Com.* 93 Pa. 284.

## § 220. Matters of Pedigree.

a. **Definition.**—Pedigree as authoritatively defined is "a succession of degrees from the origin; it is the state of the family as far as regards the relationship of the different members, their birth, marriages and deaths. This term is applied to persons or families

who trace their origin or descent." Bouvier, Law Dict. *title*, "Pedigree."

"On account of the difficulty of proving in the ordinary manner, by living witnesses, facts which occurred in remote times, hearsay evidence has been admitted to prove a pedigree." *Ibid*.

The term pedigree embraces not only descent and relationship, but birth, marriage and death, and the times when these events happened, and the rule permits hearsay evidence of deceased members of the family in any case involving pedigree. *Eisenlord v. Clum*, 126 N. Y. 552.

The eminent authority of *Mr. Justice Story* may be invoked as sustaining this proposition, and the rules of law have been relaxed as regards hearsay evidence to an extent far beyond what has been applied to other cases. This relaxation is founded on principles of public convenience and necessity. *Chirac v. Reinecker*, 27 U. S. 2 Pet. 613, 7 L. ed. 538.

**b. When Admitted.**—In inquiries into events which happened a long time ago, and beyond the memory of living witnesses, hearsay is admitted, as in questions of pedigree, the declarations of deceased members of the family, entries in family Bibles or other books, recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in family mansions or preserved in family, and the will of an ancestor though found cancelled, and not known to have been proved or acted upon, if it appears to have been treated as a paper relating to the family. 3 Bac. Abr. 630, *title* "Evidence;" *Higham v. Ridgway*, 10 East, 120; *Berkeley Peerage Case*, 4 Campb. 401; Bull. N. P. 233; *Goodright v. Moss*, Cowp. 594; *Vowles v. Young*, 13 Ves. Jr. 143; *Douglass v. Sanderson*, 2 U. S. 2 Dall. 116, 1 L. ed. 312, 1 Yeates, 15; *Winder v. Little*, 1 Yeates, 152; *Lilly v. Kitzmiller*, 1 Yeates, 28; *Raborg v. Hammond*, 2 Harr. & G. 42; *Lewis v. Marshall*, 30 U. S. 5 Pet. 470-476, 8 L. ed. 195-197; *Collins v. Grantham*, 12 Ind. 440; *Clara v. Ewell*, 2 Cranch, C. C. 208; *North Brookfield v. Warren*, 16 Gray, 171; *Doe v. Davies*, 10 Q. B. 314; Abb. Trial Ev. 93; *Russell v. Jackson*, 22 Wend. 277; *Cowan v. Hite*, 2 A. K. Marsh. 238; *Shuman v. Shuman*, 27 Pa. 90.

Declarations of persons not members of the family, if known to have been intimately acquainted with the family, may be received. *Gilbert*, Ev. 112; *King v. Eriswell*, 3 T. R. 723.



Proof by one of the family that a younger brother of the person last seised had many years before gone abroad, and that the repute of the family was that he had died there, and the witness had never heard in the family of his having been married, has been admitted as good *prima facie* evidence of such person's death without lawful issue. *Doe v. Griffin*, 15 East, 293.

Evidence of hearsay may be given to prove pedigree. The declarations of persons uninterested and who are then dead are admissible. *Strickland v. Poole*, 1 U. S. 1 Dall. 14, 1 L. ed. 17; *Stein v. Bowman*, 38 U. S. 13 Pet. 209, 10 L. ed. 129.

Declarations of servants and intimate acquaintances are not admissible in questions of pedigree, but only those of kindred. *Johnson v. Lawson*, 2 Bing. 86.

The facts of family history which may be proved by hearsay from proper sources are the following:

Birth; *North Brookfield v. Warren*, 16 Gray, 174; *American L. Ins. & T. Co. v. Rosenagle*, 77 Pa. 507, 516.

Living or survival; *Doe v. Pembroke*, 11 East, 504.

Marriage; *Caujolle v. Ferrie*, 23 N. Y. 90; *Cunninghams v. Cunninghams*, 2 Dow. 482-511; *Com. v. Stump*, 53 Pa. 132; *Hill v. Burger*, 3 Bradf. 432-437; *Lyle v. Ellwood*, 11 Moak's Eng. Rep. 702.

Issue or want of issue; *People v. Fulton F. Ins. Co.* 25 Wend. 208; *King v. Fowler*, 11 Pick. 302.

Death; *Mason v. Fuller*, 45 Vt. 29; 1 Tayl. Ev. §§ 570-572.

The times either definite or relative of those facts; *Roe v. Rawlings*, 7 East, 290; *Webb v. Richardson*, 42 Vt. 465; *Bridger v. Huett*, 2 Fost. & F. 35.

Relative age or seniority; *Doe v. Pembroke*, 11 East, 504.

Name; *Monkton v. Atty-Gen.* 2 Russ. & M. 158.

Relationship generally and its degree; *Doe v. Randall*, 2 Moore & P. 20-26; *Vowles v. Young*, 13 Ves. Jr. 147; *Webb v. Richardson*, 42 Vt. 465; *Chapman v. Chapman*, 2 Conn. 350.

The place of residence when proved for purposes of identification; *Cuddy v. Brown*, 78 Ill. 415; *Shields v. Boucher*, 1 DeG. & Sm. 40; *Doe v. Randall*, 2 Moore & P. 20; Abb. Trial Ev. 91.

See also on this subject, *North Brookfield v. Warren*, 16 Gray, 174; *Primm v. Stewart*, 7 Tex. 178; *Westfield v. Warren*, 8 N. J. L. 306; *Stouvenel v. Stephens*, 26 How. Pr. 244; *Morewood v. Wood*, 14 East, 330; *Sprigg v. Moale*, 28 Md. 497-509.

The declarations must be those of deceased members of the family legally related by blood or marriage to the family whose history the facts concern. 1 Tayl. Ev. §§ 576, 579, 581; *Emerson v. White*, 29 N. H. 491; *Doe v. Randall*, 2 Moore & P. 20; *Scott v. Ratliffe*, 30 U. S. 5 Pet. 81, 8 L. ed. 54; *Waldron v. Tuttle*, 4 N. H. 371, 378; *Chapman v. Chapman*, 2 Conn. 347; *Greenleaf v. Dubuque & S. C. R. Co.* 30 Iowa, 301; *Webb v. Richardson*, 42 Vt. 465; *Alexander v. Chamberlin*, 1 Thomp. & C. 600.

Hearsay, general repute, traditional evidence, ancient writings, physicians' record of birth, etc., are admissible in proof of pedigree, death, marriage, etc. *Jackson v. Cooley*, 8 Johns. 128; *Jackson v. Boneham*, 15 Johns. 226; *Jackson v. Bowner*, 18 Johns. 37; *Jackson v. King*, 5 Cow. 237; *Russell v. Jackson*, 22 Wend. 277; *People v. Fulton F. Ins. Co.* 25 Wend. 205; *Caujolle v. Ferrie*, 26 Barb. 177; *Leggett v. Boyd*, 3 Wend. 376; *Arms v. Middleton*, 23 Barb. 571; *Jackson v. Etz*, 5 Cow. 314; *Bunert v. Day*, 3 Wash. C. C. 243; *Boudereau v. Montgomery*, 4 Wash. C. C. 186; *Stein v. Bowman*, 38 U. S. 13 Pet. 209, 10 L. ed. 129; *Secrist v. Green*, 70 U. S. 3 Wall. 744, 18 L. ed. 153; *Jewell v. Jewell*, 42 U. S. 1 How. 210, 11 L. ed. 108; *Scott v. Ratliffe*, 30 U. S. 5 Pet. 81, 8 L. ed. 54; *Fisher v. Carter*, 1 Wall. Jr. 69; *Nelson v. Hall*, 1 McLean, 518; *Beard v. Talbot*, Cooke (Tenn.) 142; *Re Hall*, 1 Wall. Jr. 85; *Chamberlain v. Chamberlain*, 71 N. Y. 423; *Kobbe v. Price*, 14 Hun, 55; *McCarty v. Terry*, 7 Lans. 239; *McCarty v. Deming*, 4 Lans. 440.

An entry in the family Bible as to the date of plaintiff's births evidently made years after the event occurred with nothing to show by whom or under what circumstances it was made; and a statement as to the date of her birth in a letter written to plaintiff by her deceased aunt in reference to a contemplated litigation,—are not sufficient to establish such date in a contest as to the infancy of plaintiff at the time she executed a deed. *Ancy v. Cockey* (Md.) 19 Wash. L. Rep. 163.

**c. Views of United States Supreme Court.**—The United States Supreme Court is in entire harmony with the English decisions regarding matters of pedigree, and we tabulate the following authorities as suggestive of the topic under review.

A letter containing statements as to his family pedigree sworn by the wife to have been written by her husband, who also swore that the facts stated in the letter had been frequently men-

tioned by her husband in his lifetime, is legal evidence concerning the pedigree. *Elliott v. Piersol*, 26 U. S. 1 Pet. 328, 7 L. ed. 164.

A leaf from a family Bible containing names of the children of one deceased, under whom plaintiff claims, annexed to a notarial certificate from another State, that it was cut from the Bible in the notary's presence, and sworn before him to be the property and family Bible of the deceased, is admissible in evidence. *Douglas v. Sanderson*, 2 U. S. 2 Dall. 116, 1 L. ed. 312.

Entries in church registers of the burials and in the family Bible, of deaths, are admissible as evidence to prove the decease of a person. *Lewis v. Marshall*, 30 U. S. 5 Pet. 470, 8 L. ed. 195.

Recitals of facts of family history in an ancient deed may be proved as against persons who are not parties to the deeds, and who claim no right under it. *Deery v. Cray*, 72 U. S. 5 Wall. 795, 18 L. ed. 653; *Stein v. Bowman*, 38 U. S. 13 Pet. 209, 10 L. ed. 129.

Evidence by hearsay and general reputation is admissible as to pedigree, but not to establish the freedom of a party's ancestor. *Davis v. Wood*, 14 U. S. 1 Wheat. 6, 4 L. ed. 22.

Declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. *Elliott v. Peirsol*, 26 U. S. 1 Pet. 328, 7 L. ed. 164; *Stein v. Bowman*, *supra*.

Where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed against which one of the parties claimed, but no controversy was then expected to arise about the heirship, a letter written, stating the pedigree of the claimants, was not excluded by the rule of law as to declarations made *post litem motam*. *Elliott v. Peirsol*, *supra*.

**d. Miscellaneous Authorities Collated.**—In cases of pedigree, hearsay evidence of declarations of persons who from their situation were likely to know, is admissible when the person making the declarations is dead. *Eisenlord v. Clum*, 126 N. Y. 552.

The weight to be given this kind of evidence depends upon the facts surrounding each particular case. It is plain, however, that in cases of pedigree the declarations to be admissible need not be a part of the *res gestæ*, for if they were, they would be admissible on that ground irrespective of any question of their admissibility as in a case of pedigree. The exception to the general rule in the latter case takes a wide range. Traditional declarations become

the best evidence sometimes, when those best acquainted with the fact are dead. When derived from those who are most likely to know the truth and are under no bias to misrepresent the fact, such evidence affords a reasonable presumption of the truth. Stark. Ev. (9th Am. ed.) 47.

Upon questions of pedigree, *i. e.*, in a controversy merely genealogical, hearsay evidence is allowed as to the time of birth of a certain party, as to a marriage, death, legitimacy or the reverse, consanguinity generally, and particular degrees thereof, and of affinity. (Per Vice-Chancellor Knight-Bruce, in *Shields v. Boucher*, 1 DeG. & S. 40-52.)

In respect to such proof of particular facts it has been said that a birth, however, from a single woman, a birth from a married woman, a death, a marriage, is a particular fact or a single act which, of course, is provable by hearsay (hearsay from a proper quarter) on a question of pedigree. *Ibid.*

The only case looking to the contrary that I have found is *Westfield v. Warren*, 8 N. J. L. 306, where Ewing, *Ch. J.*, said that where marriage was to be shown as a substantive, independent fact it was within none of the exceptions to the general rule, and that hearsay evidence could not be received. The case was one regarding the settlement of a pauper, and might well have been placed upon the ground that it was not a case of pedigree at all. In *Rex v. Frith*, 8 East, 539, *Chief Justice* Ellenborough held, in a case of a settlement of a pauper, that it was not a case of pedigree, but simply a question as to what place an undisputed birth derived from acknowledged parents had taken place in.

We think it entirely clear that from the nature of the case, as well as upon authority, a case of pedigree forms an exception to the general rule as to proof of a particular fact by hearsay, reputation or tradition. As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age or relationship. Where these questions are merely incidental and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper and things of that nature, the case is not one of pedigree, although questions of marriage, legitimacy, death or birth are incidentally inquired of. *Whittuck v. Waters*, 4 Car. & P. 375.

Thus, in *Haines v. Guthrie*, L. R. 13 Q. B. Div. 818, it was held both in the Queen's Bench Division and in the Court of Ap-

peal that declarations of a deceased father were not admissible in evidence to prove the age of his son who had been sued for the price of a horse sold him, and who had set up the defense of infancy. They would have been admissible, the court stated, if the case had been one of pedigree. Brett, *M. R.*, in the course of his opinion in the Court of Appeal, shows the absence of those facts which make up a case of pedigree, for he says: "What the family of the defendant is is immaterial, whose son he is is immaterial, whether he is a legitimate or illegitimate son is immaterial, and whether he is an elder or a younger son is immaterial. No question of family is raised in the case." It simply involved the point of the age of a defendant for the purpose of thereby determining his liability upon a contract which he had made, and upon which, if of age, he was liable. The judgment would in such case establish no fact in any contest the defendant might have in regard to property depending upon his being a member of his father's family, or his age at any particular time. It was not at all a genealogical controversy, but a mere collateral issue, and hence the rule in pedigree cases did not apply. *Eisenlord v. Clum*, 126 N. Y. 552.

It has been stated that declarations in regard to particular facts are not competent. This is true in cases where proof of custom, right of way, of common and the like is offered. But in a case of pedigree it is always a particular fact that is to be proved, and in relation to which the declarations of the deceased person are offered, and in such cases the particular facts stated, such as birth (place or time, where material), marriage and death, are competent. (1 Phil. Ev. Cow. & H. & Edw. notes, 251).

"In the case of tombstones, no doubt the publicity of the inscription gives a sort of authenticity to it, and if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true; but you cannot put it higher than that." *Haslam v. Cron*, 19 Week. Rep. 969; Powell, Evidence, (4th ed.) 181.

"The ground upon which the inscription on a tombstone or a tablet in a church is admitted is that it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence; where a pedigree hung up in the family mansion is received, it is on the ground of its recognition by the members of the family." Park, *J.*, *Davies v.*

*Lowndes*, 6 Man. & G. 525. So placards and notices posted on walls, fences, rocks and other immovable substances may be proved by parol evidence.

Another rule peculiarly applicable in this connection is that which excludes the extra judicial statements of third persons whenever hearsay evidence is offered to show the nature of such statements, unless they form a part of the *res gestæ*, or are made by parties since deceased in the regular course of office or of business, or are shown to be declarations or admissions against their manifest interests. *Gaines v. Relf*, 53 U. S. 12 How. 472, 13 L. ed. 1071; *Nudd v. Burrows*, 91 U. S. 426, 23 L. ed. 286; *Evans v. Hettick*, 3 Wash. C. C. 408; *Gains v. Hasty*, 63 Me. 361; *Gordon v. Shurtliff*, 8 N. H. 260; *Page v. Parker*, 40 N. H. 47; *Goddard v. Pratt*, 16 Pick. 412; *Chapin v. Taft*, 18 Pick. 379; *Howland v. Crocker*, 7 Allen, 153; *Brown v. Mooers*, 6 Gray, 451; *Young v. Makepeace*, 103 Mass. 50; *Salmon v. Orser*, 5 Duer, 511; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Treat v. Barber*, 7 Conn. 274; *Wallace v. Story*, 139 Mass. 115; *Robinson v. Litchfield*, 112 Mass. 28; *Brooks v. Action*, 117 Mass. 204; *Carter v. Fitz*, 124 Mass. 269; *Stockwell v. Blamey*, 129 Mass. 312; *Com. v. Felch*, 132 Mass. 22; *Roberts v. Medbery*, 132 Mass. 101; *Wallace v. Story*, 139 Mass. 115; *McCormick v. Robb*, 24 Pa. 44; *Eureka Ins. Co. v. Robinson*, 56 Pa. 256; *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407; *Atwell v. Miller*, 11 Md. 348; *Williamson v. Dillon* 1 Harr. & G. 444; *Rosenstock v. Tormey*, 32 Md. 169; *Forrester v. State*, 46 Md. 154; *M'Kinney v. M'Connel*, 1 Bibb, 239; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Atwood v. Cornwall*, 28 Mich. 336; *People v. Mead*, 50 Mich. 228; *Troman v. Thompson*, 51 Mich. 452; *King v. Frost*, 28 Minn. 417; *Keegan v. Carpenter*, 47 Ind. 597; *Reynolds v. Copeland*, 71 Ind. 422; *Simpkins v. Smith*, 94 Ind. 470; *Jones v. Doe*, 2 Ill. 276; *Aiken v. Hodge*, 61 Ill. 436; *Pollard v. People*, 69 Ill. 148; *Bornheimer v. Baldwin*, 42 Cal. 27; *Flynn v. Merchants Mut. Ins. Co.* 17 La. Ann. 135; *Davis v. State*, 37 Tex. 227; *Stringfellow v. Montgomery*, 57 Tex. 349; *Howell v. Howell*, 37 Mo. 124; *Bain v. Clark*, 39 Mo. 252; *Atwell v. Lynch*, 39 Mo. 519; *Cobleigh v. McBride*, 45 Iowa, 116; *State v. Weaver*, 57 Iowa, 730; *Clinton Lumber Co. v. Mitchell*, 61 Iowa, 132; *State v. Keith*, 63 N. C. 140; *State v. Haynes*, 71 N. C. 79; *Berry v. Osborne*, 15 Ga. 194; *Hartshorn v. Williams*, 31 Ala. 149; *Owens v. State*, 74 Ala. 401; *Wells v. Shipp*, 1 Walk. (Miss.) 353; *Kean v. Newell*, 2 Mo. 9.

### § 221. Declarations Against Interest.

**a. Declaration, when Deemed Irrelevant.**—A declaration is deemed to be relevant, if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it and if it was opposed to his pecuniary or proprietary interest. This is the exact phraseology employed by Bayley, *J.*, in *Gleadow v. Atkin*, 1 Car. & M. 423. This ruling has been incorporated bodily under art. 28 of Stephen's Digest and has been cordially accepted as a correct statement of the law as administered in the United States.

**b. The English Rule.**—The learned author extending the article referred to says: "The whole of any such declaration and of any other statement referred to in it is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements, not referred to or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.

"A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and (it seems) though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part.

"A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.

"An indorsement or memorandum of payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation; but any such declaration made in any other form by, or by the direction of, the person to whom the payment was made is, when such person is dead, sufficient proof for the purpose aforesaid.

"Any indorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of

the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made; but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.

“Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.”

**c. A Distinction Noted.**—“There are two classes of admissible entries, between which there is a clear distinction, in regard to the principle on which they are received in evidence. The one class consists of entries made against the interest of the party making them; and these derive their admissibility from this circumstance alone. It is therefore not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but as he is dead, the entry of the fact made by him in the ordinary course of his business, and against his interest, is received as secondary evidence in a controversy between third persons. The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry, as evidence, lies in this, that it was contemporaneous with the principal fact done, forming a link in the chain of events and being a part of the *res gestæ*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily indeed, but ordinarily and naturally, to the principal thing. It is on this ground that this latter class of entries is admitted; and therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead, nor whether he was, or was not, interested in making them, his interest going only to affect the credibility or weight of the evidence when received.” 1 Greenleaf, § 120.

Entries and memoranda, made by persons since deceased, in the ordinary course of professional and official employment are competent secondary evidence of the facts contained in them, where they had no interest to misrepresent or misstate them. *Nicholls v. Webb*, 21 U. S. 8 Wheat. 326, 5 L. ed. 628. They are admitted from necessity. In *Leland v. Cameron*, 31 N. Y. 115, the entry by an attorney in his register, in the proceedings in the



action, of the issuing of an execution which could not be found, was held, the attorney being dead, to be competent evidence of the fact that the execution was issued. Nor is it necessary, as the defendant claims, that the entry should have been made in a book, to make the evidence admissible. No cases have been cited which proceed upon this distinction, and there is no principle upon which it can be supported. See *Porter v. Judson*, 1 Gray, 175; *Doe v. Turford*, 3 Barn. & Ad. 868; *Livingston v. Arnoux*, 56 N. Y. 507.

Records of this character are admissible within the principle of numerous authorities relating to the entries and memoranda of deceased persons. The receipt of the sheriff was a written paper against his interest, for by it he was charged for the amount of money mentioned in the receipt; and the principle applicable to such a paper is that it not only proved the simple fact of payment, but it may be received to every incidental matter stated in the declaration, even in an action between third persons. *Middleton v. Melton*, 5 Mood. & R. 264, 10 Barn. & C. 317. The rule has been asserted to the extent of a disregard of all references to the circumstances of any privity between the deceased and the defendant. *Goss v. Watlington*, 3 Brod. & Bing. 132; *Whitnash v. George*, 8 Barn. & C. 556, 3 Mood. & R. 42.

It is said in the text of Phil. Ev. 298, that "the acknowledgments by deceased stewards and bailiffs in their books of the receipt of money for which they have been accountable are very frequently adduced in evidence by their employers, or those claiming under them, or by strangers," and at page 299, it is remarked that "receipts for the payment of money to prove the fact of its having been received, though there exists no privity between the deceased and the party against whom the evidence is tendered." Lord Ellenborough said in *Harrison v. Blades*, 3 Campb. 458, that a tax gatherer's receipts would be evidence after his death to prove who was the occupier of certain premises. For further illustration of the rule, see *Thompson v. Stevens*, 2 Nott & McC. 493; *Chase v. Smith*, 5 Vt. 559; *Barker v. Ray*, 2 Russ. 63; *Wilbur v. Selden*, 6 Cow. 162; *Leland v. Cameron*, 31 N. Y. 115.

**d. Declarations in Disparagement of Title.**—Declarations of persons in possession of land in disparagement of title of the declarant, are admissible as original evidence. Possession is *prima*

facie evidence of a fee simple, and the declaration of a possessor, that he is tenant to another, it is said, makes most strongly against his own interest, and is therefore admissible. *Simpkins v. Rogers*, 15 Ill. 398.

Declarations of a person having the possession, seisin and control of lands, in harmony with a deed which he had executed or authorized, and which was against his interest, in reference to property not conveyed or not shown to have been conveyed, are admissible on the question of title. *Bowen v. Chase*, 98 U. S. 254, 25 L. ed. 47.

When by succession of title a party to a suit is so far in privity with another that he could be affected by his acts, then he can be affected by his admissions only when they are made during the latter's interest in the subject matter of the suit; for then only can he ingraft them upon the interests so that they will follow it into the hands of his successor. But as to the self-disserving declarations of the real party to the suit, this, as we have seen, is not the test of admissibility. And although the best text-writers do not all suggest precisely the same ground of admissibility, yet we venture to say that it is a sufficient ground that they are the declarations of a party in interest, and are relevant to the issue. *Barber v. Bennett*, 1 L. R. A. 224, 60 Vt. 662, 6 Am. St. Rep. 141.

Declarations against interest of party are admissible in evidence against him. *Dennis v. Chapman*, 19 Ala. 29, 54 Am. Dec. 186.

The act, declaration or admission of a party against his interest is relevant.

The declaration of a person to whom a party has referred for information in reference to a matter in dispute is relevant.

The act or declaration of another person in the presence and with the observation of a party, and his conduct in relation thereto is relevant, if under all the circumstances of the case, he would have been likely to have been affected by the act or the declaration.

A declaration of one claiming title to real property while in the actual or constructive possession thereof, is relevant in his own behalf, of one claiming under him, to characterize his possession, or as to boundaries, or the extent of his occupation.

A valuable group of authorities are found collected by *Justice Coffey* in *Lowman v. Sheets*, 7 L. R. A. 784, 124 Ind. 416.

The principle contended for in the text has received consider-

able amplification in the decisions of the Supreme Court of Indiana, and it is well settled in that jurisdiction that declarations made while in possession of the property, by a person in possession thereof, are admissible in evidence upon an issue as to such ownership, as they are deemed to form a part of the *res gestæ*. *Bunnell v. Studebaker*, 88 Ind. 338; *Kuhns v. Gates*, 92 Ind. 66; *McConnell v. Hannah*, 96 Ind. 102; *Creighton v. Hoppis*, 99 Ind. 369; *Durham v. Shannon*, 116 Ind. 403. It remains to add that the principle invoked in this rule has been the subject of much judicial discussion, which has resulted in some confusion of the authorities.

§ 222. **Telephonic Communication not Hearsay Evidence.**—

A well recognized exception, the last it is our duty to notice, has been imposed upon the law of evidence by the introduction of telephonic communication. The extent to which the commercial activity of the entire business community is involved in the solution of this question makes it one of obvious importance, and while there is some contradiction from the earlier authorities bearing upon the subject, the drift of recent adjudication is in accord with common sense suggestions on the subject.

The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on.

The fact that the voice at the telephone was not identified does not render the conversation inadmissible.

The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances; but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it. *Wolfe v. Missouri Pac. R. Co.* 3 L. R. A. 539, 97 Mo. 473.

The question was one of first impression in Missouri at the time so far as appears, and both reason and authority will sustain the conclusion reached.

**a. Recent Adjudications Considered.**—This entire subject received exceptional treatment in a monographic note appended to a case tried in Indiana in 1888 (*Central U. Teleph. Co. v. State*, 118 Ind. 194), and reported in 10 Am. St. Rep. 114.

After elaborate discussion of other principles that logically appertain to telephonic matters, the note proceeds as follows:

“As telephones are used by all classes of persons for business purposes, some legal effect must be given to conversations held over them; and to the existence of this legal effect it is essential that such conversations should, at least under some circumstances, be receivable as evidence. It is true that many objections to their reception exist. The person talking cannot be seen, nor is there any method of authenticating and preserving for future reference what he says. Yet where both parties resort to this method of communication, they must intend that some legal result shall follow. If they are not willing to assume the risks incident to the mode, they should decline to resort to it, or permit others to communicate with them in that way. If the person receiving the message can recognize the voice of the sender, or testifies that he recognized it, there is but little objection to his being permitted to state the contents of the communication thus received. *People v. Ward*, 3 N. Y. Crim. Rep. 483, 511. If the voice is not recognized, but the conversation is held through a telephone kept in a business house or office it is admissible.

“The one to whom the message is sent may not be in direct communication with the telephone. The conversation may be conducted by an operator in charge of a public telephone station, in which event, as the message does not personally concern the operator, he will rarely remember its contents. In such a case it has been held by a divided court that the conversation was admissible in evidence, and that the person receiving the message may state its contents as detailed to him by the operator at the time, when it appears from other evidence that the person against whom the evidence was offered did in fact talk over the wire at that time. “When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making him an agent to repeat what he is saying to another party; and in such a case cer-

tainly the statements of the operator are competent, being the declarations of the agent, and made during the progress of the transaction.

"If he is ignorant whether he is talking to the person with whom he wishes to communicate, or with the operator, or even any third party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because a person using a telephone knows that there is one at each station whose business it is so to act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence." *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901.

"In *Banning v. Banning*, 80 Cal. 271, an acknowledgment of a deed by a married woman was sought to be avoided on the ground that she was at the time the notary took the acknowledgment three miles distant from him, and communicated with him and he with her by telephone only. But the court disposed of the question as follows: "It is admitted that the certificate of the notary is in due form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily and without the hearing of her husband acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception or fraud was practiced to induce her to execute the deeds; nor even that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone.

"These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress or mistake." The court then proceeded to consider the authorities bearing upon the question whether a certificate of the acknowledgment of a deed by a married woman can be contradicted collaterally; and having reached the conclusion that such certificate could not be successfully assailed, otherwise than by proving fraud, sustained the deed and acknowledgment in question.

"Hence while the court expressly withheld its opinion upon the

question whether an acknowledgment by telephone is good, "under any circumstances," the inevitable logical result of its decision is, that such acknowledgment, followed by a certificate in due form, is good under all circumstances, unless vitiated by fraud."

The case was strenuously contested by very eminent counsel, whose main contention was that, the defendant not having been personally present before the notary, and not having acknowledged to him the execution of the deeds, his certificates are false and fraudulent, and therefore void. In support of this position they cite *Johnston v. Wallace*, 53 Miss. 338; *Williamson v. Carskadden*, 36 Ohio St. 665; *Smith v. Ward*, 2 Root, 374; 1 Am. Dec. 80; *Heeter v. Glasgow*, 79 Pa. 79; *Howell v. McCrie*, 36 Kan. 636, 59 Am. Rep. 584; *Donahue v. Mills*, 41 Ark. 421; *Jackson v. Humphrey*, 1 Johns. 498; Civ. Code, §§ 1186, 1187, 1191.

**b. Tendency of Modern Decisions.**—The tenor and trend of adjudication, in so far as it has been allowed to treat the subject, clearly indicates the disposition of the American courts to apply the settled rule relating to public agents to those laws by which it is sought to govern companies operating the telephone. In harmony with this view, a telephone company is required to furnish indiscriminately to any and all persons applying for the same, a transmitter and its usual appurtenances, and any evidence tending to show a refusal of the same, assuming that the parties offer to comply with all just regulations, is competent. *State v. Bell Teleph. Co.* 36 Ohio St. 296, 38 Am. Rep. 583; and see extended reportorial note, *State v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Bell Teleph. Co. v. Com.* (Pa.) 3 Cent. Rep. 907, as reported in a monographic note appended to the case of *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167.

In *State v. Nebraska Teleph. Co. supra*, Mr. Justice Reese said, in the course of the prevailing opinion, that the telephone by the necessities of commerce and public use has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its

wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of nor against any.

The principles established and declared by the courts and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when these principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new development of time and circumstances. They extend from the horse and its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone, "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances." *Pensacola Tel. Co. v. Western U. Teleg. Co.* 96 U. S. 9, 24 L. ed. 708.

This last decision is especially pertinent to this subject. The opinion was delivered by Waite, *Ch. J.*, who very adroitly evades the dilemma occasioned by the unfortunate decision in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357. Both *Justices* Field and Hunt dissented, the former writing a dissenting opinion of exceptional vigor that considerably impairs the force of the prevailing view. It seems that under the authorities, which impress upon telephone companies the status of public carriers, the remedy by mandamus is appropriate where the evidence shows a refusal to discharge against the private citizen a duty which their relations to the public clearly impose. *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *People v. Albany & Vt. R. Co.* 24 N. Y. 261; 2 Shelf. Rail. 864; *Moses, Mand.* 155, 168, 171, 176; 2 Redf. Rail. 257, 275, 294; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *State v. Bell Teleph. Co. supra.*

It is believed that the principles of our unwritten law, conscientiously interpreted and judicially applied, will furnish an adequate solution to all perplexities which are likely to arise. It must be conceded, however, that the direct adjudications upon the subject of this chapter are comparatively few, entirely modern, and principally American. In view of the cases already cited, it is obviously erroneous to treat the subject as "*res integra*" unaffected by any paramount authority, as we can apprehend the tendency of juridical sentiment from the cases already decided.



## CHAPTER XI.

### ADMISSIONS.

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### § 223. Various Definitions of the Term.

a. **Bouvier's Definition, Haines' Treatise.**—Admissions in evidence are the concessions or voluntary acknowledgments made by a party of the existence of truth of certain facts.

As distinguished from confessions, the term is applied to civil transactions, and to matters of fact in criminal cases where there is no criminal intent.

As distinguished from consent, an admission may be said to be evidence furnished by the party's own act of his consent at a previous period. Bouv. Law Dict. *title* "Admissions."

Under the head of exceptions to the rule rejecting hearsay evidence, it has been usual to treat of admissions and confessions by the party, considering them as declarations against his interest, and, therefore, probably true. But in regard to many admissions, and especially those implied from conduct and assumed character, it cannot be supposed that the party, at the time of the principal declaration or act done, believed himself to be speaking or acting against his own interest, but often the contrary. Such evidence seems, therefore, more properly admissible as a substitute for the ordinary and legal proof. But however the admission may have been made, whether intentionally or unintentionally, if it is offered against the party making it, it is competent evidence; if

it is offered in his favor, it is incompetent. Haines' Treat. (12th ed.) 657.

b. **The General Rule.**—The general rule is, that the declarations of a party to the record, or of one identified in interest with him are, as against such party, admissible in evidence. If they proceed from a stranger and cannot be brought home to the party, they are admissible, unless upon some of the other grounds already considered. Haines' Treat. (12th ed.) 657.

The rule of law with respect to self-regarding evidence is, that when in the self-serving form it is not in general receivable; but that in the self-harming form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind. Gilbert, Ev. (4th ed.) 119.

Although when viewed independently of jurisprudence, it would be difficult to maintain that the declarations, or what is equivalent to the declarations of one man may not in particular cases have some probative force as evidence against another,—still our law rejects them in obedience to its great principle, which requires judicial evidence to be proximate; and also from peculiar temptations to fraud and fabrication, which the allowing such evidence would so obviously supply. This is a branch of the general rule, that a man shall not be allowed to make evidence for himself. But on the other hand, the universal experience of mankind testifies that, as men consult their own interest, and seek their own advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears.

c. **Opinion of Best and Others.**—The subject of self-serving evidence may therefore be despatched in few words, and indeed has been substantially considered under the title, "*Res inter alios acta alteri nocere non debet.*" There are, however, some exceptions to the rule excluding it. The first is, that where a part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider and attach what weight they see fit to any self-serving statements it contains. This exception is founded on the plain principle of justice, that, by using a man's statement against him, you adopt that statement as evidence at least. Best, Ev. §§ 519, 520.

Admissions made in the course of negotiations having for their

object the discontinuance of a litigation or the settlement of a controversy are within the special protection of the law. The reason often assigned by *Lord Mansfield* was, that it must be permitted to men to buy their peace without prejudice if an offer to buy does not succeed." *Peake*, Ev. 19.

In *Turner v. Railton*, 2 Esp. 474, *Lord Kenyon* observed, "concessions made for the purpose of settling the business for which the action is brought cannot be given in evidence, but facts admitted I have always received." *Swift*, Ev. 126.

It is never the intention of the law to shut out the truth, but to repel any inference which may arise from a proposition made, not with a design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made because it is a fact, the evidence to prove is competent, whatever motive may have prompted to the declaration. But if the party admits a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. *Bartlett v. Tarbow*, 1 Abb. App. Dec. 120; *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *Waldridge v. Kennison*, 1 Esp. 143; *Doon v. Ravey*, 49 Vt. 293.

*Judge Woodworth*, in an early New York case, very aptly says: "Propositions on either side, made by parties on a treaty for composing their differences, if it be ineffectual, ought not to operate as evidence in a future contest. It seems to me that a different rule would be laying a snare for suitors, and calculated to entrap a party. It is taking advantage of expressions made in moments of confidence, when he is off his guard, by the prospect of compromise." *Williams v. Thorp*, 8 Cow. 201.

The principle contended for in the text has received ample vindication in a number of decisions, among which we cite the following: *Ferry v. Taylor*, 33 Mo. 323; *Jackson v. Clopton*, 66 Ala. 29; *Keaton v. Mayo*, 71 Ga. 649; *Watson v. Williams*, Harp. L. 447; *Richards v. Noyes*, 44 Wis. 609; *Campau v. Dubois*, 39 Mich. 274; *Mundhenk v. C. I. R. Co.* 57 Iowa, 718; *Dailey v. Coons*, 64 Ind. 545; *Kinsey v. Grimes*, 7 Blackf. 290; *Barker v. Bushnell*, 75 Ill. 220; *Reynolds v. Manning*, 15 Md. 510; *Arthur v. James*, 28 Pa. 236; *Tryon v. Miller*, 1 Whart. 11; *Slocum v. Perkins*, 3 Serg. & R. 295; *Wrege v. Westcott*, 30 N. J. L. 212; *Payne v. Forty-Second St. & G. St. F. R. Co.* 8 Jones & S. 8; *Daniels v. Woonsocket*, 11 R. I. 4; *Draper v. Hatfield*, 124 Mass.

53; *Harrington v. Lincoln*, 4 Gray, 563; *Saunders v. McCarthy*, 8 Allen, 42; *Gerrish v. Sweetser*, 4 Pick. 374; *Perkins v. Concord R. Co.* 44 N. H. 223; *Rowell v. Montville*, 4 Me. 270; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868; *McCorquodale v. Bell*, L. R. 1 C. P. Div. 471; *Skinner v. Great Northern R. Co.* L. R. 9 Exch. 289; *Paddock v. Forrister*, 3 Scott, N. R. 734; *Paddock v. Forrester*, 3 Man. & G. 903; *Healey v. Thatcher*, 8 Car. & P. 388; *Hoghton v. Hoghton*, 15 Beav. 321; *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473, *note*.

Admissions are not conclusive upon the party calling for them, but are to be considered and weighed like other evidence. *Ayers v. Metcalf*, 39 Ill. 307.

**d. The English Rule.**—An admission is a statement, oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. Every admission is (subject to the rules hereinafter stated), deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favor unless it is, or is deemed to be, relevant for some other reason. Stephen, Dig. art. 15.

In this connection it is well to remember, that where a party on the trial of a cause avails himself of an admission of his adversary to sustain his action or defense, the opposite party is entitled to prove such other parts of the conversation had on his part as tend to explain, modify or even destroy the admission made by him, but is not at liberty to call for such parts of the conversation had by him as relate to assertions made operating in his favor upon the general merits of the case, but having no connection with the admission made. *Garry v. Nicholson*, 24 Wend. 350; *Kelsey v. Bush*, 2 Hill, 440; *Rouse v. Whited*, 25 N. Y. 170; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 258.

Admissions may be made on behalf of the real party to any proceeding—

1. By any nominal party to that proceeding;
2. By any person who, though not a party to the proceeding, has a substantial interest in the event;
3. By any one who is privy in law, in blood, or in estate to any party to the proceeding on behalf of that party.

A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case, it seems it

must be made whilst the person making it sustains that character.

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission, unless it is made during the continuance of the interest which entitles him to make it. Stephen, Dig. art. 16.

It is well in this immediate connection to call attention to the fact that the early common law regulations as to the admissions of a former owner of personal property while in possession of the same have been wholly abrogated.

Where the plaintiff had, previous to the suit, assigned his interest in the debt or chose in action, of which the defendant had notice, evidence of confessions subsequently made by him, as to the demands of the defendant against him, which might impair the interest so assigned, or prejudice the rights of the assignee, for whose benefit the suit was prosecuted, is inadmissible. *Frear v. Evertson*, 20 Johns. 142.

Judge Story says: "Courts of law, following, in this respect, the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment." *Welch v. Mundeleville*, 14 U. S. 1 Wheat. 233, 4 L. ed. 79.

Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify or destroy its effect on the other side. This is a settled principle which has passed by its universality into an axiom of the law. *Mutual Ben. L. Ins. Co. v. Newton*, 89 U. S. 32, 22 L. ed. 793.

**e. Oral Admissions Cautiously Received.**—Oral admissions must be cautiously received, and cannot destroy the force of a settlement deliberately made by parties both of whom must have known the truth as to their transactions. *Durkee v. Stringham*, 8 Wis. 1.

**f. Classification of Best.**—Upon this general topic of admissions it is well to observe the classification which has been adopted,

the very high authority and which it might argue a want of nice discrimination to neglect; to avoid an imputation of this nature I will quote from Mr. Best: "Self-harming statements in civil cases are usually called 'admissions,' and those in criminal cases 'confessions.' The civilians and canonists express all kinds under the term 'confession.' Self-harming statements are divisible into 'plenary' and 'not plenary.' A 'plenary' confession is when a self-disserving statement is such as if believed, to be conclusive against the person making it, at least on the physical facts of the matter to which it relates; as where a party accused of murder says, 'I murdered,' or 'I killed,' the deceased. In such cases the proof is in the nature of direct evidence, and the maxim is, '*Habemus opimum testem, confitentem reum.*' A confession 'not plenary' is where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates; but only gives rise to a presumption inference of their truth, and is therefore in the nature of circumstantial evidence.

"Although as already stated, self-harming evidence is in general admissible against the party supplying it, it has been made a great question, whether this extends to the proof of the contents of written instruments or documents, *i. e.* whether the principle, that such are the best or primary evidence of their own contents, does not override the principle under consideration. Elementary as this point may seem, it has only been settled of late years, if indeed it can be deemed fully settled even now; and there is probably not one question to be found in the whole law of England which has caused greater difference of opinion." Best, Prin. of Ev. §§ 523-525.

§ 224. **Admissions Without Prejudice.**—There is no doubt but that the rule is well established in this country that the admission of a distinct fact which in itself tends to establish a cause of action or defense, is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice; but if the admission is of such a nature as that the court can see it would not have been made except for the purpose of producing the objects of the negotiation, and under an agreement that could fairly be implied from the circumstances that it was not to be used afterwards to his prejudice, it is not error for the court to exclude the evidence. The rule referred to is founded



upon public policy, and with a view of encouraging and facilitating the settlement of legal controversies by compromise, which object is supposed to be obstructed by the fear entertained by litigants that such a negotiation may be converted into a trap to inveigle the unwary into hazardous admissions. The law, therefore, excludes such admissions as appear to have been made tentatively or hypothetically, but admits those only which concede the existence of a fact. *White v. Old Dominion Steamship Co.* 3 Cent. Rep. 40, 102 N. Y. 661.

In *Hartford Bridge Co. v. Granger*, 4 Conn. 142, Hosmer, *Ch. J.*, says: "The question to be considered is what was the view and intention of the party in making the admission, whether it was to concede a fact hypothetically in order to effect a settlement, or declare a fact really to exist."

§ 225. **Admissions of Previous Owner.**—Whether the admission of the previous owner of a chose in action can be proved against a purchaser from him who has bought for a fair consideration, and between whom and the former owner there exists no other relation than that of purchaser and seller. It is not the case of a nominal purchase, the former owner retaining the equitable interest, but of an actual and complete transfer of all interest to the purchaser. On that question, *Paige v. Cagwin*, 7 Hill, 361, is a full authority. That case was ably considered by the court which determined it, and put an end to whatever doubts had been entertained upon the question involved. *Stark v. Boswell*, 6 Hill, 405, was decided shortly after *Paige v. Cagwin*, and the supreme court held the evidence of a mortgagee's admissions inadmissible to effect the purchaser of the land under a sale on a statute foreclosure. In *Booth v. Sweeney*, 8 N. Y. 276, the point was again raised, and this court held the admissions of the mortgagee inadmissible against his issue.

§ 226. **Admissions in a Pleading.**—"The policy of the law is to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. The subject is treated at length in 1 Phil. Ev. 308-401, and T. E. §§ 653-788 (1 Greenl. Ev. §§ 169 *et seq.*). A vast variety of cases upon admissions of every sort may be found by referring to Roscoe, N. P. (Index, under the word *Ad-*

*missions*). It may be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of documents, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated in Taylor's Ev. §§ 655-665. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery. The ingenuity of equity draughtsmen was under that system greatly exercised in drawing answers in such a form that it was impossible to read part of them without reading the whole, and the ingenuity of the court was at least as much exercised in countermining their ingenious devices. The power of administering interrogatories, and of examining the parties directly, has made great changes in these matters." Stephen, Dig. art. 15, *note*.

### § 227. Admissions Under Oath.

**a. What Necessary to Satisfy Present Rule.**—The law does not regard as sufficiently authentic to influence a jury, any statement which is not made under the sanction of an oath; and in general, it further requires that the witness making the statement should be present at the trial, to the end that he may be examined by the adverse party, and that the jury may draw their own conclusions as to his sincerity and accuracy by his appearance and bearing upon the witness stand. This rule does not however, embrace the admissions of a party to the action; for upon equally plain principles, any thing which a man says against himself may be given in evidence by his adversary, as it is not to be supposed that one will make a statement adverse to his own interest unless it is true. But to render admission of the adverse party competent as evidence, it must be of some fact material to the issue; for if the circumstances admitted be of such a character that it would have no just bearing upon the case, if otherwise proved, it is not to be received because its existence is established out of the mouth of the party against whom it is offered. *Stephens v. Vroman*, 18 Barb. 250.

And see *McGee v. Raiguel*, 64 Pa. 110; *Chicago & N. W. R. Co. v. Boone County Suprs.* 44 Ill. 240; *Ashlock v. Linder*, 50

Ill. 169; *Birchard v. Booth*, 4 Wis. 67; *Frink v. Coe*, 4 G. Greene, 555; *Pence v. Makepeace*, 65 Ind. 345; *Ector v. Welsh*, 29 Ga. 443; *Plummer v. Currier*, 52 N. H. 287; *Robinson v. Stuart*, 68 Me. 61; *Goodnow v. Parsons*, 36 Vt. 46; *Jacobs v. Shorey*, 48 N. H. 100; *Kennedy v. Wood*, 52 Hun, 46.

b. **Extreme Caution in Applying.**—Evidence of the admissions by a party of the fact sought to be established against him, is always received with great caution and scrutiny; and as a general rule it is for the jury to say whether the admissions, as made, establish to their satisfaction the fact in issue. *Michigan Carbon Works v. Schad*, 38 Hun, 71.

c. **Views of New York Court of Appeals.**—The principle contended for and ultimately decided in the case of *Stephens v. Vroman*, 18 Barb. 250, has never been condemned by express adjudication, and its wide acceptance as a correct formula for the rule in vogue must be regarded as conclusively recognizing its reliability. It has been decided upon principles well established in reference to the competency of declarations made by a party to a suit in respect to a point material to the issue. It is sustained on principle and authority, and the dissenting opinion of three judges of high repute has failed to overrule or efface the logic of *Ch. J. Denio*, who wrote the prevailing opinion in favor of a reversal of the judgment of the supreme court. An early case before the New York Court of Errors which has been extensively cited in other jurisdictions holds that admissions and declarations should always be scrutinized and received with caution as it is the most dangerous evidence that can be admitted in a court of justice, and the most liable to abuse. (*Vide* opinion of Walworth, *Chancellor*, in *Law v. Merrills*, 6 Wend. 268). And we find the record of a similar judicial condemnation in *Malin v. Malin*, 1 Wend. 625, which establishes the unsatisfactory nature of this grade of evidence unless corroborated by extrinsic circumstances.

d. **Affinities with Estoppel.**—This entire subject of admissions and declarations is closely implicated with the kindred topic of estoppel, and in all instances we suggest a cross-reference to the text and annotation under that title. The most analytical and exhaustive work on evidence is bereft of most of its usefulness if these topics are so estranged and alienated as to become matters of separate and distinct consideration. Obviously the value of an admission or declaration may be vastly augmented if

it can be made to appear that such admission or declaration can be raised to the dignity of a legal or equitable estoppel. Very frequently they trench closely upon the boundary line, and in all instances there is more or less tendency to blend the rules applicable to both admission and estoppel. Hence in any comprehensive review of the law of evidence, the one should be regarded as the corollary or pendant of the other. In the present work, such treatment will be accorded both topics as will best expand the principles underlying them with a view of placing before the practitioner the latest utterances of the courts regarding these subdivisions of the law.

### § 228. Entire Admission to be Taken Together.

**a. Views of Authority as to This Rule.**—On the subject of admissions it may be laid down as a first principle, that the whole of the statement containing the admission is to be received together. This is necessary in order to enable the court and jury to judge of the true extent of the admission which, when taken entire will often have a different import from that which a partial account might convey. *Thomson v. Austen*, 2 Dowl. & R. 358; *Trammell v. Bassett*, 24 Ark. 499; *Barnes v. Allen*, 1 Abb. App. Dec. 111; *Searles v. Thompson*, 18 Minn. 316; *People v. Murphy*, 39 Cal. 52; *Barry v. Davis*, 33 Mich. 515.

This entire subject received very careful consideration from the New York Court of Appeals in the case of *Rouse v. Whited*, 25 N. Y. 170. From the opinion of Judge Sutherland, we extract the following:

“It is plain that there must be some limitation of the right of the party whose statement or admission, forming a part of a conversation, has been given in evidence against him to prove further or other statements or declarations made by him at the same time or as part of the same conversation, otherwise the court and the jury might be compelled to listen to a long story about matters not at all connected with any matter or thing in controversy between the parties. No one will say that a party whose statement has been given in evidence against him by his opponent, has a right to prove all that he said at the same time or in the same conversation, solely because such further or other statements were made at the time or in the same conversation.”

**b. Conclusions in the Queen's Case.**—The question then is, what is the rule of the limitation of this right? In the *Queen's*

*Case*, 2 Brod. & B. 297, 298. Abbott, *Ch. J.*, in delivering the opinion of the court on certain questions proposed to the lords and judges, said: "The conversations of a party to the suits are, in themselves, evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation, and not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit, because it would not be just to take a part of a conversation as evidence against a party without giving to the party at the time, the benefit of the entire residue of what he said on this occasion."

The rule, as thus stated, was certainly very broad. The only limitation upon the right of the party to give the whole conversation, in evidence by the rule, as thus stated, would seem to be, that the other or further part or parts of the conversation offered in evidence, to be admissible, must relate to the subject matter of the action. By the rule as thus stated, if the defendant is sued as the maker of two several promissory notes, to one of which his defense is that he never made it, and to the other that he had paid it, and the plaintiff proves on the trial that at a certain time the defendant admitted or said that the note which he had denied making was his note, or that he had made and delivered it, the defendant has a right to prove, that at the same time, or as part of the same conversation, he also said that he had paid the other note. So, also, by the rule as thus stated if the plaintiff has but one cause of action, and cannot recover without establishing affirmatively two distinct issuable facts, if for the purpose of establishing one of them he gives evidence of a statement or an admission of the defendant relative to it, the defendant has a right to give evidence of what he said at the same time or in the same conversation, relative to the other. As for instance, take the case put by *Judge Cowen* in *Garey v. Nicholson*, 24 Wend. 351. The defendant is sued as indorser; he denies that he indorsed the note, and he also denies that he received due notice of its dishonor. The plaintiff proves his admission that he received due notice of dishonor by the rule as stated by Abbott, *Ch. J.*, in *Queen's Case*, 2 Brod. & B. 297. The defendant has a right to

show, that when he made the admission, he also said that the indorsement was a forgery.

The rule, as stated by Abbott, *Ch. J.*, was adopted by Starkie and laid down in his work on evidence. Stark. Ev. (2d. ed.) 180.

**c. Lord Denman's Rule.**—In *Prince v. Samo*, 7 Ad. & El. 627, Lord Denman, *Ch. J.*, who delivered the opinion of the court, referred to the broad language of the rule, as laid down in Starkie's Evidence, on the authority of Abbott, *Ch. J.*, in the *Queen's Case*, and denied that he had the countenance of authority for the extent to which it went. He denied that any rule letting in the whole conversation of a party merely because it relates to the subject matter of the action had the countenance of authority. He stated the rule to be, that where part of a conversation had been given in evidence, any other or further part of the conversation might be given in evidence in reply, which would in any way explain or qualify the part first given in evidence.

In *Forrest v. Forrest*, 6 Duer, 102, the rule as stated in *Prince v. Samo*, and approved in *Garey v. Nicholson*, was somewhat criticised, and held not to apply to documentary evidence. The rule was also approved in *Dorlon v. Douglass*, 6 Barb. 451, although there may be some doubt whether it was properly applied in the case. The rule was also recognized in *Sturge v. Buchanan*, 10 Ad. & El. 598.

All the cases which I have examined, where it has been held that the whole admission or statement of the party must be taken together, are within the rule as stated in *Prince v. Samo*, *supra*.

The principle contended for, and which allows the entire admission in evidence, is grounded upon such obvious principles of justice, that it may be regarded as an established rule regulating the introduction of evidence. The subtlety and acuteness of the most refined logician, has been unable to discover any just reason for invading the sanctity of this well settled law.

In criminal actions where the subject of admissions becomes metamorphosed into that of confessions, the subject receives an increased importance.

## § 229. Admissions of a Partner.

**a. Partnership Relation Must be Established.**—Before the admissions of a partner can be received in evidence the existence of a partnership must be established, and while the admissions or declarations of a person may be given in evidence against him to

show that he is a partner in the firm, it must be remembered that the declarations of one person that another is a partner are not legal evidence as to the latter; they are evidence against those only who make them. *McPherson v. Rathbone*, 7 Wend. 216; *Henry v. Williard*, 73 N. C. 35; *Ruhe v. Burnell*, 121 Mass. 450; *Cross v. Langley*, 50 Ala. 8; *Smith v. Hulett*, 65 Ill. 495; *Johnson v. Gallivan*, 52 N. H. 143; *Hoppock v. Moses*, 43 How. Pr. 201.

It is well settled that after the dissolution of a partnership, admissions of any of the former individual partners of the firm are not binding, further than as against the party making them. *Nichols v. White*, 85 N. Y. 531. An agency except for special purposes is terminated by dissolution; and admissions made by those previously identified in interest are to be regarded as if made by a stranger. *Hogg v. Orgill*, 34 Pa. 344.

**b. A Distinction Noted.**—An important distinction has been ingrafted upon this rule relative to admissions of former partners after the dissolution of the firm. Where such an admission relates to the business of winding up the partnership affairs and closing out the business they are pertinent and binding, as the law regards them as partners for special purposes although there may have been a technical and legal dissolution of the partnership. *Nichols v. White*, *supra*.

### § 230. Admissions of an Agent.

**a. When Admissible.**—Admissions made by an agent, made while acting within the scope of his authority and within the legitimate province of his delegated power, are by universal rules of evidence admissible as against his principal. *Nelson v. Cowing*, 6 Hill, 336; *Peck v. Ritchey*, 66 Mo. 114; *Mix v. Osby*, 62 Ill. 193; *Howe Mach. Co. v. Snow*, 32 Iowa, 433; *Thomas v. Sternheimer*, 29 Md. 268. This rule may be regarded as firmly established in all jurisdictions. The Federal court has given emphatic utterance to the same doctrine, and in the case of *Cliquot's Champagne*, 70 U. S. 3 Wall. 144, 18 L. ed. 121. *Mr. Justice Swain*, in delivering the opinion of the court, employs the following comprehensive language: Whatever is done by an agent in reference to the business in which he is, at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved, as well in criminal as in civil cases, in all respects as if the principal were the actor or speaker. Such admissions, if made subsequent to the time of making the contract in refer-

ence to its subject matter, are inadmissible (*Hubbard v. Elmer*, 7 Wend. 446); and proof of agency or combination must be given before acts or declarations of the alleged agent or conspirator can be proved. *People v. Parish*, 4 Denio, 153.

**b. Part of Res Gestæ.**—The admissions or declarations of the agent are received in evidence against the principal, not as admissions or declarations merely, but as parts of the *res gestæ*; hence, only such as accompany the transaction in which the agent acted can be proved; what the agent said at a subsequent time is inadmissible. *Fogg v. Child*, 13 Barb. 246; *Isles v. Tucker*, 5 Duer, 393.

Although in obedience to the cardinal rule of evidence proof of the agency must be first adduced; still, such agency may be admitted before proof after the introduction of pertinent testimony as to his admissions. This merely affects the order of proof, and is largely within the discretion of the trial court. *First Unitarian Soc. v. Faulkner*, 91 U. S. 420, 23 L. ed. 284. It has been also held that it is not within the scope of an agency to make admissions or declarations as to the circumstances under which and the purposes for which the agent has purchased property for the principal. Such admissions or declarations are only recitals of the admissions or circumstances of past occurrences, and constitute in their essence hearsay evidence. *Winchester & P. Mfg. Co. v. Creary*, 116 U. S. 161, 29 L. ed. 591; *Leeds v. Marine Ins. Co.* 15 U. S. 2 Wheat. 380, 4 L. ed. 266.

**c. Rule Applies in Both General and Special Cases.**—An essential prerequisite must be observed under the decision in all these cases where it is sought to charge a principal through the admissions of his agent. It is not alone necessary to prove that an agency existed; it must further appear that at the time the declaration or admission was made such agent was executing the authority conferred upon him, and that the admissions directly related to the subject matter in controversy, or were so intimately implicated with it as to constitute a part of the *res gestæ*. The rule is clearly operative in all cases whether the agency be general or special, or whether the principal is a corporation or a private person. *White v. Miller*, 71 N. Y. 118; *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264. This principle was further elaborated by Sir William Grant with great clearness and accuracy in *Fairlie v. Hastings*, 10 Ves. Jr. 129. He said: "What an



agent has said may be what constitutes the agreement of the principal or the representations or statements may be the foundation of or the inducement to the agreement; therefore, if a writing is not necessary by law, the evidence must be admitted to prove the agent did make that statement or representation; so with regard to acts done, the words with which the acts are accompanied frequently tend to determine their quality. The party thereunder to be bound by an act must be affected by the words, but except in one or the other of these statements I do not know how what is said by an agent can be evidence against the principal. The mere assertion of a fact cannot amount to prove it though it may have some relation to the business in which the person making the assertion was employed as agent." See also Story, Agency, §§ 134, 137; *Luby v. Hudson River R. Co.* 17 N. Y. 131. The rule that the declarations of the agent are inadmissible to bind the principal, unless they constitute the agreement which he is authorized to make, or relate to and accompany an act done in the course of the agency is applicable in all cases, whether the agency is a general or special one. Ang. & A. Corp. § 309.

**d. Its Application in a Recent Case.**—Thus in an action upon a policy of insurance the casual statement of an agent when not in the performance of any duty for his principal that proof of loss mailed to the home office had been received is not competent evidence against the company. *Dean v. Aetna L. Ins. Co.* 62 N. Y. 642. In this connection it is pertinent to remark that the agency cannot be proved by general representation. *Perkins v. Stebbins*, 29 Barb. 523.

A mere declaration of the alleged agent made without the knowledge of the supposed principal is no evidence of the agency. In order to establish that relation it must be shown by other testimony than that of the supposed agent. *Davis v. Henderson*, 20 Wis. 520.

One obvious means of determining this relation of agency is by the acts of the parties. A person performing services, negotiating sales, signing contracts and incurring liabilities for and on behalf of an absent principal, may be deemed, and in contemplation of law is the agent for the party, especially where such acts are recognized by the putative principal (*Woodwell v. Brown*, 44 Pa. 121); and it is competent to introduce testimony showing his original authority to so act. *Woodbury v. Larned*, 5 Minn. 339.

And generally as in cases of partnership the admissions of an agent, after his authority or relationship to his principal has terminated, are not evidence against his principal. *Janeway v. Skerritt*, 30 N. J. L. 97.

**e. The Prevailing Doctrine Stated.**—The prevailing doctrine as regards the admissibility of this grade of evidence was stated in an early English case by Dallas, *Ch. J.* Thus it is not true that where an agency is established the declarations of the agent are admitted merely because they are his declarations; they are only evidence when they form a part of the contract entered into by the agent on behalf of the principal, and in that single case they become admissible. The declarations of an agent at a different time have been decided not to be evidence; indeed the cases on the subject draw this distinction between the declarations of the agent accompanying the making of and therefore forming part of the contract, and those made either at a subsequent or antecedent period. *Betham v. Benson*, Gow. 48. The basis of such admissions is the legal identity of the principal and the agent and the fact that his declarations are a part of the *res gestæ*. *McDermott v. Hannibal & St. J. R. Co.* 73 Mo. 516, 39 Am. Rep. 526; *Moore v. Meucham*, 10 N. Y. 207; *Galceran v. Noble*, 66 Ga. 367.

**f. Application of Rule, How Tested.**—This is now the well established doctrine and its application to other acts of an agent, besides that of making contracts, is equally well settled. The declarations of an agent are received not as admissions but as part of the *res gestæ*. *Haven v. Brown*, 7 Me. 425; *Rogers v. McCune*, 19 Mo. 557; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 328. The doctrine is very clearly stated in the case last above cited; the courts say: "It is true that where the acts of the agent will bind the principal, there his declarations, representations and admissions respecting the subject matter will also bind him, if made at the same time and constituting a part of the *res gestæ*. They are in the nature of original evidence, and not of hearsay. The representations and statements in such cases being the ultimate facts to be proved, and not an admission of some other fact. An admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the continuance of his agency in regard to the transaction then pending. It is because it is a verbal act, and a

part of the *res gestæ*, that it is admissible at all. This well established principle usually constitutes an unerring guide in determining whether or not the declarations of an agent are admissible in evidence against his principal."

The declarations of an agent cannot bind his principal unless they are part of the *res gestæ*. *Pittsburgh, C. & St. L. R. Co. v. Theobald*, 51 Ind. 249, and cases cited; *La Rose v. Logansport Nat. Bank*, 102 Ind. 346; *Williamson v. Cambridge R. Co.* 3 New Eng. Rep. 750, 144 Mass. 148.

Agency cannot be proved by the declarations of the alleged agent. *Pepper v. Cairns*, 7 L. R. A. 750, 133 Pa. 114.

**g. Explanatory Acts Admissible.**—Where an agent's acts are admissible his accompanying declarations explanatory of the acts are also admissible in evidence, and it is not necessary that the agent himself be called upon to prove such declarations. *Sidney School Furniture Co. v. Warsaw School Dist.* 122 Pa. 494; *Central Pennsylvania Telph. & S. Co. v. Thompson*, 2 Cent. Rep. 544, 112 Pa. 118.

An agent's declarations *in pais* are not proof of his own authority. *Jordan v. Stewart*, 23 Pa. 244. To the same effect are *Grim v. Bonnell*, 78 Pa. 152; *Whiting v. Lake*, 91 Pa. 349.

**h. Summary of Conclusions.**—Admissions of an agent are not evidence without proof of the agency; but the former may be admitted before proof of the latter. *First Unitarian Soc. v. Faulkner*, 91 U. S. 415, 23 L. ed. 283.

An admission by an authorized agent of a city, who participated in making a contract, is evidence to prove the contract. *Chicago v. Greer*, 76 U. S. 9 Wall. 726, 19 L. ed. 769.

The admission of an agent, some time after the death of the insured, that it would be best for the insurance company to pay the policy, is inadmissible against the company. *American L. Ins. Co. v. Mahone*, 88 U. S. 21 Wall. 152, 22 L. ed. 593.

It is not within the scope of an agency to make admissions or declarations as to the circumstances under which, and the purpose for which the agent has purchased property; such admissions or declarations are only recitals of the admission, or circumstances of a past occurrence, and constitute, in their essence, hearsay evidence. *Winchester & P. Mfg. Co. v. Creary*, 116 U. S. 161, 29 L. ed. 591.

Summarizing the conclusion of authority upon this subject, we

may affirm that it is substantially embodied in § 27 of the proposed New York Code of Evidence. The section states the law with precision and conciseness in the following language:

“After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence, is relevant against such party; the act or declaration of one joint debtor, joint contractor or joint owner or of one party after the dissolution of the firm, is relevant against the other only if made when the declarant is actually engaged in the business in which they are jointly interested; but as to such persons, the act or declaration of one is not relevant against the other to revive or continue a liability barred, or which, without such admissions, would be barred by the Statute of Limitations.”

The rule is well settled that what an agent says while acting within the scope of his authority is admissible against his principal as part of the *res gestæ*, but not statements or representations made by him at any other time. *Shelhamer v. Thomas*, 7 Serg. & R. 106; *Levering v. Rittenhouse*, 4 Whart. 130; *Jordan v. Stewart*, 23 Pa. 244. The admissions of an agent not made at the time of the transaction, but subsequently, are not evidence; thus the letters of an agent to his principal containing a narration of the transaction in which he had been employed are not admissible against the principal. *Hough v. Doyle*, 4 Rawle, 291; *Clark v. Baker*, 2 Whart. 340. Naked declarations which are not part of any *res gestæ* are mere hearsay, like words spoken by a stranger. *Patton v. Minesinger*, 25 Pa. 393; *Pennsylvania R. Co. v. Books*, 57 Pa. 339, 98 Am. Dec. 223.

### § 231. Admissions of Attorney.

**a. When Privileged.**—Admissions made by a client while in consultation with his attorney, and in fact all communication between parties so situated, which are the proper subject of professional employment, are privileged, and although admissions in the strict technical sense of the term, they cannot invade the province of legal evidence, without the express assent of both parties. See *Yates v. Olmstead*, 56 N. Y. 632, citing *Britton v. Lorenz*, 45 N. Y. 51; *Whiting v. Barney*, 30 N. Y. 330; *Covey v. Tannahill*, 1 Hill, 33; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 533, 5 L. ed. 1001. The mere fact that the counsel himself only regarded the communication as a merely casual conversation

is of no account (*Moore v. Bray*, 10 Pa. 519; 1 Best, Ev. (American Notes by H. G. Wood) 329, *note*; *Coveney v. Tannahill, Bank of Utica v. Mersereau*, *supra*). The privilege is the privilege of the client, and the attorney cannot testify, even if he is willing to do so, without the consent of his client. *Wilson v. Rastall*, 4 T. R. 759; 1 Phil. Ev. 163; Bull. N. P. 284; *Chirac v. Reinicker*, 24 U. S. 11 Wheat. 280, 6 L. ed. 474; *Rhoades v. Selin*, 4 Wash. C. C. 718; *Jenkinson v. State*, 5 Blackf. 465; *Murray v. Dowling*, 1 Cranch, C. C. 151; *People v. Atkinson*, 40 Cal. 284; 1 Best, Ev. (American Notes by H. G. Wood) 328, 329, *notes*.

**b. Considered Confidential.**—The principle upon which these communications are protected from disclosure applies to every attempt to give them in evidence, without the assent thereto of the person making them. That principle is, that he who seeks aid or advice of a lawyer, ought to be altogether free from the dread that his secrets will be uncovered; to the end that he may speak freely and fully all that is in his mind. Now this principle is not wholly kept, if what is thus said may be told without his assent, though to the immediate harm or help of another only. The disclosure is made, his secret is bruited, and he has it no longer in his power to stay it from use by any in strife with him, just as much when given in testimony against another as against him. It is not, indeed, put directly in evidence against him to his immediate harm or help of another only, but that thing, the knowledge of which was confined to him and his adviser, has become matter of common knowledge, and may be the cause of harm to him. The effect may not be so direct and immediate, yet it is a possible effect, and the foreseen possibility would press upon his lips, when in consultation with his legal adviser, nearly as heavily as if testimony of what he showed to his counsel could be called out in evidence against himself. A branch of the rule, to wit: that the communication is to be inviolate, though no suit be begun or contemplated, shows that though there is no present use of the evidence of it against him, the communication is made under the seal of professional confidence. And it is but a further natural growth of the rule, that the communication is to be privileged from being put in evidence for or against another, lest it, by means of the knowledge of it thus given be used to harm for the sustaining or defense of a suit thereafter begun in which he may be made a party. *Bacon v. Frisbie*, 80 N. Y. 400 (Folger, J.

But it is a rule of very extensive application, that where the admission or communication are made in the presence of all the parties to the controversy, they are not privileged but the evidence is competent between such parties. *Britton v. Lorenz*, 45 N. Y. 51.

This subject naturally blends with that of "*Privileged Communications*," and receives due attention in another chapter of this work.

### § 232. Admissions by or to Husband or Wife.

**a. Rule as Grounded in Marriage Relation.**—Admissions of a husband or wife as against the other are not evidence merely by force and virtue of the marriage relation. One may lawfully act as the agent of the other, in which case the admissions will be admissible as against either. And the question as to the authorization of either party to so act, and the extent of the power delegated are always questions of fact to be determined by evidence. Admissions made by one against the other are not evidence merely because the marriage relation enforces certain rights and liabilities or disabilities; nor does the conjugal relationship imply or impute any necessary grade or agency. Evidence of statements made by a husband concerning his wife's claim to certain lands in controversy is grossly incompetent in any absence of evidence that he spoke by her authority. *Towles v. Fisher*, 77 N. C. 437.

Where the evidence shows that the husband has directly or tacitly conferred upon the wife the relations and incidents of agency, he is concluded by her acts or admission made within the legitimate scope of the agency he has created. *Wheeler & W. Mfg. Co. v. Tinsley*, 75 Mo. 458; *Gebhart v. Burkett*, 57 Ind. 378; *Cantrell v. Colwell*, 3 Head, 471; *Lang v. Waters*, 47 Ala. 624; *Rochelle v. Harrison*, 8 Port. (Ala.) 351; *Colgan v. Philips*, 7 Rich. L. 359; *Carey v. Adkins*, 4 Campb. 92; *Emerson v. Blonden*, 1 Esp. 142; *Clifford v. Burton*, 1 Bing. 199; *Pickering v. Pickering*, 6 N. H. 120; *Peck v. Ward*, 18 Pa. 506; *Chamberlain v. Davis*, 33 N. H. 121; *Riley v. Suydam*, 4 Barb. 222; *Ripley v. Mason*, Hill & D. Supp. 66; *Mackinley v. M'Gregor*, 3 Whart. 369; *Murphy v. Hubert*, 16 Pa. 50; *Barr v. Greenawalt*, 62 Pa. 172; *Stall v. Meek*, 70 Pa. 181.

Either may act as agent for the other, with or without compensation; and the husband's creditors, where he so uses his skill without an agreement for remuneration, are not thereby de-

frauded. See generally, wife as husband's agent, 31 Alb. L. J. 206, 207, cases; he as her agent, with compensation, 30 Alb. L. J. 444, 445, cases; without compensation, *King v. Voos*, 14 Or. 91, cases.

It was at one time a mooted question in the courts, whether the common law disabilities of the wife were so far modified, as to permit her to manage her estate through the intervention of agents and employees; but it is now entirely settled that she acquired, in this respect, the usual rights incident to absolute ownership, and that she could avail herself of any agency, even that of her husband, with the same effect as if they were not united in marriage. *Owen v. Cawley*, 36 N. Y. 600.

The agency existing between husband and wife should in all instances be established. Conclusive evidence, however, is not required and it may be disclosed by inferential circumstances. *Fisher v. Conway*, 21 Kan. 18; *Whitescarver v. Bonney*, 9 Iowa, 480; *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535; *Continental Ins. Co. v. Delpeuch*, 82 Pa. 225; *Gilson v. Gilson*, 16 Vt. 464; *Benford v. Sanner*, 40 Pa. 9; *Second Nat. Bank v. Miller*, 2 Thomp. & C. 104; *Butler v. Price*, 115 Mass. 578.

**b. What Necessary to Charge the Husband.**—In order to charge the husband with the admissions of his wife, some authorization actually conferred or necessarily inferable from the surrounding circumstances must be shown. *Rochelle v. Harrison*, 8 Port. (Ala.) 351. The case of *Lay Grae v. Peterson*, 2 Sandf. 338, establishes the proposition stated in the text, and it is our authority for holding that except where the agency is established the admissions of the wife cannot bind the husband or be used against him. Admissions of a wife after a separation are competent evidence for the husband in a case in which her relation is that of mutual agent for him and a third person. *Fenner v. Lewis*, 10 Johns. 38.

The declaration of the husband that he is not a married man, made in promiscuous conversations having no relation to his wife, are inadmissible in reference to his marriage. *Van Truyl v. Van Truyl*, 8 Abb. Pr. N. S. 5.

The declarations of a wife that she will not live with her husband have been held admissible in favor of the husband, in an action against him for necessities furnished to her. *Usher v. Holleman*, 5 N. Y. Leg. Obs. 99.

The criminal features of all admissions made by either husband

or wife will receive exhaustive treatment in another volume of this work.

### § 233. Admissions of Parties to Promissory Notes.

a. **Usually Inadmissible Against Purchaser.**—Admissions of a party to a promissory note, although made after the maturity of the same, and while it was in his possession, are inadmissible against a purchaser for value; but otherwise if made before he parted with his interest in the note. *Clews v. Kehr*, 90 N. Y. 633. An acknowledgment made by the maker of a note to one who once held it as indorsee will inure to the benefit of the holder (*McRae v. Kennon*, 1 Ala. 295); so the declarations made by the payee of a negotiable promissory note while he owns and holds it, are inadmissible in evidence against one to whom it is subsequently transferred for value, even though the transfer is made after maturity. *Paige v. Cagwin*, 7 Hill, 361. The case last cited holds that the vendee or assignee must be a purchaser for value in order to make the declaration inadmissible and this must be regarded as an essential portion of the rule, and it has been directly held that the declarations of the prior holder of a promissory note transferred after maturity are admissible against an indorsee where the latter is a holder for value. *Von Sachs v. Kretz*, 72 N. Y. 548.

b. **Rule in *Paige v. Cagwin*.**—The case of *Paige v. Cagwin*, 7 Hill, 361, has been repeatedly cited as an authority upon this proposition, and must be regarded as conclusively establishing the principle under review; it was a suit by an indorsee against one of the makers of a joint and several promissory note transferred for value after maturity to the plaintiff. On the trial the defendant offered to prove the declarations of the payee of the note made while he was the holder, to establish that the defendant executed the note as a mere surety for one of his co-makers, and an agreement between the payee and the principal debtor after the note was made, extending the time of payment. The evidence was rejected, and the ruling was approved by the New York supreme court, and the judgment of that court was affirmed by the Court of Errors. The opinion of *Senator Lott* in the Court of Errors, contains an elaborate review of authorities bearing upon that question. The learned reporter in the syllabus of the case, states as a proposition decided that declarations made by the payee of a negotiable promissory note while he owned and holds



it, are not admissible against one to whom it is subsequently transferred for value, though the transfer is made after maturity. The qualification as above indicated, that the vendee or assignee must be a purchaser for value in order to make the declaration admissible was directly adjudicated in *Brisbane v. Pratt*, 4 Denio, 63, where it was held that the declarations of a prior holder of a promissory note transferred after maturity are admissible against his indorsee, where the latter is not a holder for value. In *James v. Chalmers*, 6 N. Y. 209, this case was questioned upon another point decided that the presumption that an indorsee of a note is a holder for value does not exist where it is shown that he took it after maturity, but the decision on the other point was questioned in *Green v. Givan*, 33 N. Y. 369. The case of *Brisbane v. Pratt* decided with approval upon the point that the plaintiff must be a holder for value in order to exclude the declarations of a prior party in interest from whom he derives his title. See also in further support of the proposition of the text, *Van Gelder v. Van Gelder*, 81 N. Y. 625; *Truax v. Slater*, 86 N. Y. 630; *City Bank of Brooklyn v. McChesney*, 20 N. Y. 240; *Beach v. Wise*, 1 Hill, 612; *Whitaker v. Brown*, 8 Wend. 490.

The rule is the same, although the payee is dead at the time his declarations are offered in evidence. *Beach v. Wise*, 1 Hill, 612. See *Dodge v. Freedman's Sav. & T. Co.* 93 U. S. 379, 23 L. ed. 920.

The decisions we have enumerated embody this proposition. A holder for value of a negotiable paper cannot be affected by declarations or admissions of the maker or indorsers of the note made after he became the holder and owner. Admissions made by the payee of a promissory note through whom the plaintiff derives title as indorsee, are not evidence to change the maker, although his admission made on a previous day in this charge of the maker had been given in evidence by the latter; the latter admission not being in the same conversation. *Perry v. Graves*, 12 Ala. 246; *Clark v. Peabody*, 22 Me. 500.

**c. Review of Authorities.**—*Hanley v. Erskine*, 19 Ill. 265; *Hedger v. Horton*, 3 Car. & P. 179; *Rand v. Dodge*, 17 N. H. 343; *Topping v. Van Pelt*, 1 Hoffm. Ch. 545, 6 L. ed. 1239; *Currier v. Gale*, 14 Gray, 504; *Criddle v. Criddle*, 21 Mo. 522; *Mitchell v. Welch*, 17 Pa. 339; *Sylvester v. Crapo*, 15 Pick. 92; *Camp v. Walker*, 5 Watts, 482; *Shaw v. Broom*, 4 Dowl. & R. 730; *Wool-*

*way v. Rowe*, 1 Ad. & El. 116; *Barrough v. White*, 4 Barn. & C. 325; *Fisher v. True*, 38 Me. 534; *Scammon v. Scammon*, 33 N. H. 52; *Earl v. Clute*, 2 Abb. App. Dec. 1; *Porter v. Rea*, 6 Mo. 48; *Thorp v. Goewey*, 85 Ill. 611; *Sharp v. Smith*, 7 Rich. L. 3; *Glanton v. Griggs*, 5 Ga. 424; *Matthews v. Houghton*, 10 Me. 420; *Dunn v. Snell*, 15 Mass. 481; *Fitch v. Chapman*, 10 Conn. 8; *Smith v. Schanck*, 18 Barb. 344; *Kent v. Walton*, 7 Wend. 256; *Whitaker v. Brown*, 8 Wend. 490; *Weidman v. Kohr*, 4 Serg. & R. 174; *Eckert v. Cameron*, 43 Pa. 120; *Lister v. Boker*, 6 Blackf. 439.

It is settled by a formidable array of authority that a bona fide holder of negotiable paper taking for value before maturity and without notice of outstanding equities is entitled to protection, and a party seeking to impugn the character of his holding must produce satisfactory evidence that through participation in some fraudulent scheme of transfer the character of this holding is tainted with fraud. *Worcester County Bank v. Dorchester & M. Bank*, 10 Cush. 488; *Wyer v. Dorchester & M. Bank*, 11 Cush. 51; *Kelley v. Whitney*, 45 Wis. 110; *Pond v. Waterloo Agr. Works*, 50 Iowa, 600; *Lake v. Reed*, 29 Iowa, 258; *Gage v. Sharp*, 24 Iowa, 19; *Edwards v. Thomas*, 66 Mo. 483; *Comstock v. Hannah*, 76 Ill. 530; *Murray v. Beckwith*, 81 Ill. 43; *Johnson v. Way*, 27 Ohio St. 374; *Frank v. Lilienfeld*, 33 Gratt. 390; *Witte v. Williams*, 8 S. C. 290; *Citizens Nat. Bank v. Hooper*, 47 Md. 88; *Spooner v. Holmes*, 102 Mass. 503; *Smith v. Livingston*, 111 Mass. 342; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75; *Carroll v. Hayward*, 124 Mass. 120; *Stimson v. Whitney*, 130 Mass. 591; *Kellogg v. Curtis*, 69 Me. 212; *Farrell v. Lovett*, 68 Me. 326; *Hamilton v. Vought*, 34 N. J. L. 190; *Brush v. Scribner*, 11 Conn. 388; *Craft's App.* 42 Conn. 146; *Rowland v. Fowler*, 47 Conn. 347; *Phelan v. Moss*, 67 Pa. 62; *McSparran v. Neeley*, 91 Pa. 17; *Ellicott v. Martin*, 6 Md. 509; *Commercial & F. Nat. Bank v. First Nat. Bank*, 50 Md. 11.

Evidence is pertinent which tends to show the purchase of mercantile paper before due from one who is apparently the owner and for which an adequate consideration is paid. In such case the purchaser obtains a good title though he may know the facts and circumstances that would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in it; he can lose his right only by actual notice or bad faith. *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193.

As regards the purchaser's suspicions being evidence of some knowledge infecting the transaction with fraud, see *Scidmore v. Clark*, 47 Conn. 20.

d. **Summary of the Juridical View.**—As a summary of the juridical view adopted upon this subject we append the following as sufficiently characteristic:

“One who purchases commercial paper for full value before maturity, without notice of any equities between the original parties, or of any defect of title, is to be deemed a bona fide holder. He is not bound, at his peril, to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat, the duty of active inquiry, to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The authority mainly relied on in support of the opposite theory is the case of *Gill v. Cubitt*, 3 Barn. & C. 466. The doctrine of that case has been repeatedly overruled, as well in the English as in the American courts; and it cannot be recognized as authority without an innovation in our system of commercial law, fraught with infinite mischief and uncertainty. *Crook v. Jadis*, 5 Barn. & Ad. 909; *Backhouse v. Harrison*, 5 Barn. & Ad. 1098; *Goodman v. Harvey*, 4 Ad. & El. 870; *Raphael v. Bank of England*, 33 Eng. L. & Eq. 276; *Steinhart v. Boker*, 34 Barb. 436; *Goodman v. Simonds*, 61 U. S. 20 How. 343, 15 L. ed. 934; *Bank of Pittsburgh v. Neal*, 63 U. S. 22 How. 96, 16 L. ed. 323; *Murray v. Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857.”

#### § 234. “Acceptance” Defined.

a. **Relation to Law of Evidence.**—The term “acceptance” as understood by the law merchant, imports an engagement to pay a bill of exchange according to its tenor, but there is another significance inherent in the term. It is an admission that the drawer's handwriting is genuine, and hence the acceptor is debarred from offering evidence which controverts this presumption of the law. It is pertinent to state that in a treatise of this nature a system of cross-reference is indispensable, as it is obviously impossible to exhaust the treatment of any one topic which calls strenuously for extended reference under a kindred topic further on. The practitioner in the immediate topic under review, will find valuable

scholia embodied in the chapters entitled "*Presumptions*" and "*Parol Evidence*," to vary terms of written instrument.

**b. Acceptor as Principal Debtor.**—It can scarcely be too frequently repeated that in the particular contract created by a bill of exchange, the acceptor is regarded as the principal debtor or contractor, while the drawer and indorsers are looked upon as his sureties, and this mode of considering the subject ought to be kept steadily in view, in as much as it will not merely facilitate a comprehension of the forms of pleadings applicable to bills, but must also conduce to a right appreciation of the liabilities of the various parties whose names are attached to such instruments. The drawee named in a bill of exchange is not legally a party to it until he accepts it. The act of acceptance, however, is like the making of a promissory note; the acceptor then becomes the principal debtor, and he is then liable to pay the amount mentioned in the bill to the payee or holder thereof when it becomes due. And he will be liable to a person who in good faith and for value, discounted the bill before acceptance, with knowledge that it was to be accepted for the accomodation of the drawer. *First Nat. Bank v. Schuyler*, 7 Jones & S. 440; *Jarvis v. Wilson*, 46 Conn. 90; *Hamilton v. Catchings*, 58 Miss. 92; *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Cox v. National Bank of New York*, 100 U. S. 712, 25 L. ed. 741; Chitty, Bills, (13th Am. ed.) 342; Bayley, Bills, (5th ed.) 154.

**c. What Drawee Admits by Acceptance.**—In accepting a bill the drawee admits the genuineness of the drawer's signature, for he is presumed to know the signature of one who calls on him to pay out money for him, and he is therefore estopped from showing, in any action against him, that the drawer's signature was a forgery. *Wilkinson v. Lutwidge*, 1 Strange, 648; *Jenys v. Fowler*, 2 Strange, 946; *Smith v. Chester*, 1 T. R. 654; *Leach v. Buchanan*, 4 Esp. 226; *Price v. Neale*, 3 Burr. 1354; *Sanderson v. Collman*, 4 Man. & G. 209; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *Bank of United States v. Bank of Georgia*, 23 U. S. 10 Wheat. 333, 6 L. ed. 334; *Hortsmann v. Henshaw*, 52 U. S. 11 How. 177, 13 L. ed. 653; *Hoffman v. National City Bank of Milwaukee*, 79 U. S. 12 Wall. 193, 20 L. ed. 369; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *White v. Continental Nat. Bank*, 64 N. Y. 316;

*Canal Bank v. Bank of Albany*, 1 Hill, 287; *Levy v. Bank of United States*, 1 Binn. 27; *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628; *Whitney v. Bunnell*, 8 La. Ann. 429; *Peoria & O. R. Co. v. Neill*, 16 Ill. 269.

**d. Admission of Agent's Signature.**—The acceptance admits the agent's signature and authority to sign for the drawer, where the bill was drawn by procuration (*Robinson v. Yarrow*, 7 Taunt. 455, 1 Moore, 150; Chitty, Bills, 717; 1 Parsons N. & B. 322; 1 Daniel, Neg. Inst. § 537); but it has been claimed in a late case, with much show of reason therefor, that the drawee is only estopped from denying the agent's signature and authority, in any action, by a bona fide transfer; and that the estoppel does not apply to actions by the original payee.

**e. That Drawee has Funds of Drawer.**—The drawee also by acceptance admits that he has in his possession funds of the drawer, wherewith to pay the draft, and he is not permitted to deny this fact in any suit by the holder of the bill. *Raborg v. Peyton*, 15 U. S. 2 Wheat. 385, 4 L. ed. 258; *Jarvis v. Wilson*, 46 Conn. 90; *Byrd v. Bertrand*, 7 Ark. 327; *Hortzman v. Henshaw*, 52 U. S. 11 How. 177, 13 L. ed. 653; *Eastin v. Succession of Osborn*, 26 La. Ann. 153; *Hoffman v. National City Bank of Milwaukee*, 79 U. S. 12 Wall. 181, 20 L. ed. 366; *Kendall v. Galvin*, 15 Me. 131; *Gillilan v. Myers*, 31 Ill. 525; *Kemble v. Lull*, 3 McLean, 272; *Jarvis v. Wilson*, 46 Conn. 90; *Jordan v. Tarkington*, 4 Dev. L. 357; *Marsh v. Low*, 55 Ind. 271; *Byrne v. Schwing*, 6 B. Mon. 199.

But as against the drawer, it is only prima facie evidence that the drawee had such funds in his possession, and it may be rebutted by any proper testimony. *Darnell v. Williams*, 2 Stark. 145; *Parker v. Lewis*, 39 Tex. 394; *Turner v. Browder*, 5 Bush, 216; *Pomeroy v. Tanner*, 70 N. Y. 547; *Hidden v. Waldo*, 55 N. Y. 294.

**f. That Drawee has Capacity to Draw Bill.**—The drawee's acceptance admits likewise the drawer's capacity to draw the bill, so that he will be estopped from proving for the purpose of defeating the bill, that the drawer was under a legal disability because of infancy (*Taylor v. Croker*, 4 Esp. 187; *Jones v. Darch*, 4 Price, 300), or bankruptcy (*Braithwaite v. Gardiner*, 8 Q. B. 473; *Pitt v. Chappelow*, 8 Mees. & W. 616), or for any other reason, such as that the drawer was a married woman (*Smith v. Mar-*

sack, 6 C. B. 486; *Cowton v. Wickersham*, 54 Pa. 302); or a fictitious person (*Cooper v. Meyer*, 10 Barn. & C. 468; *Ashpitel v. Bryan*, 32 L. J. Q. B. 91, 3 Best & S. 474); or a corporation without authority to draw. *Halifax v. Lyle*, 3 Exch. 446.

g. **That Firm is in Existence.**—If the bill is drawn in the name of a firm, it admits the existence of such a firm (*Bass v. Clive*, 4 Maule & S. 13), and if drawn by one signing himself as executor or administrator, it admits his right to sign in that capacity. *Aspinwall v. Wake*, 10 Bing. 51.

The acceptance in the same manner, admits the capacity of the payee to indorse when the bill is drawn payable to his order, for by his acceptance he agrees to pay to the order of the payee. He cannot, therefore, set up the defense that the payee was incapacitated by law to indorse. *Jones v. Darch*, 4 Price, 300; *Taylor v. Croker*, 4 Esp. 187; *Smith v. Marsack*, 6 C. B. 486; *Drayton v. Dale*, 2 Barn. & C. 293. See *Peaslee v. Robbins*, 3 Met. 164.

### § 235. What Not Admitted by Acceptance.

a. **Genuineness of Payee's Signature.**—The acceptor does not admit the genuineness of the payee's signature, where the bill has been indorsed. If, therefore, the signature is forged, the acceptor will not be bound to pay the bill to the holder. "The plaintiffs as drawees of the bill were only held to acknowledge the signature of their correspondents; by accepting and paying the bill, they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness or any part of the instrument, or of any other names appearing thereon, or of the title of the holder." Allen, J., in *White v. Continental Nat. Bank*, 64 N. Y. 320; *Holt v. Ross*, 54 N. Y. 474; *Williams v. Drexel*, 14 Md. 566; *Hortsman v. Henshaw*, 52 U. S. 11 How. 177, 13 L. ed. 653; *Robarts v. Tucker*, 16 Q. B. 560; *Smith v. Chester*, 1 T. R. 654. If he has paid the bill on the faith of the genuineness of the payee's signature, he may recover the money back. *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Williams v. Drexel*, 14 Md. 566; *Dick v. Leverich*, 11 La. 573.

b. **Of Agent's Indorsement.**—For the same reason he does not vouch for the genuineness of an agent's indorsement, or for his authority to indorse for the payee. *Robinson v. Yarrow*, 7 Taunt. 455, Park, J.: "The mere acceptance proves the draw-

ing, but it never proves the indorsement; it is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration; the first is a power to get funds into the agent's hands, the other to pay them out." See also *Prescott v. Flynn*, 9 Bing. 19.

**c. Nor that Bill Drawn Payable to Drawer's Order.—**

The acceptance does not admit the genuineness of the payee's indorsement, even when the bill is drawn payable to the drawer's order, and the indorsement appears in the handwriting of the drawer. *Robinson v. Yarrow*, 7 Taunt, 455; *Garland v. Jacomb*, L. R. 8 Exch. 216; *Beeman v. Duck*, 11 Mees. & W. 257; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Williams v. Drexel*, 14 Md. 566. See *contra*, *Burgess v. Northern Bank*, 4 Bush, 600. But if the drawer is a fictitious person and the bill is made payable to the drawer's order, the acceptor is bound to pay to the order of the person who drew the bill. *Cooper v. Meyer*, 10 Barn. & C. 468; *Beeman v. Duck*, 11 Mees. & W. 251.

**d. Nor Body of the Bill.—**Again the acceptor does not admit the genuineness of the body of the bill, so that if the terms have been altered without authority, the acceptor is not bound by them, and can refuse to pay the altered bill. *Young v. Grote*, 4 Bing. 253; *Hall v. Fuller*, 5 Barn. & C. 750; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; *White v. Continental Nat. Bank*, 64 N. Y. 320; *Young v. Lehman*, 63 Ala. 519; *Espy v. Bank of Cincinnati*, 85 U. S. 18 Wall. 604, 21 L. ed. 947.

If he has paid the bill according to its altered terms, he could recover back the excess over the amount of the altered bill (*Bank of Commerce v. Union Bank*, 3 N. Y. 230), unless the alteration was rendered possible by the negligence of the drawer; in such a case the acceptor would be bound for the whole amount, and could not recover back any part of it, since the drawer would be bound for the whole amount to him. *Van Duzer v. Howe*, 21 N. Y. 531. The same rule prevails when the drawer alters the bill himself or acquiesces in its alteration. *Langton v. Lazarus*, 5 Mees. & W. 628; *Ward v. Allen*, 2 Met. 57. See generally on this topic Tiedeman, Com. Paper, § 230.

**§ 236. Admissions in Pleading and on the Trial.—**

Where the parties mutually agree upon a statement of facts and submit the legal questions arising thereon to court adjudication, the admission will be conclusive for that purpose.

a. **Facts Admitted Regarded as True.**—So, facts admitted by the pleadings are to be taken as true. A fact thus admitted need not be proved (*Walrod v. Bennett*, 6 Barb. 145); and no evidence is admissible to contradict an admission thus made upon the record. *Crosbie v. Leary*, 6 Bosw. 313; *Bridge v. Payson*, 5 Sandf. 210; *Robbins v. Codman*, 4 E. D. Smith, 315; *Van Dyke v. Maguire*, 57 N. Y. 429. "That what the parties have agreed to in their pleading shall be admitted though the jury find otherwise," is an ancient rule not to be departed from, except in cases where an amendment has been ordered. *Van Dyke v. Maguire*, *supra*; 7 Bac. Abr. 459.

Where an admission in the pleading of the adverse party is alone relied upon to establish a fact, any statements made in connection with the admission of another fact, which would nullify the effect of the admission, must also be held as established; the whole of the statement must be taken and construed together. *Gildersleeve v. Landon*, 73 N. Y. 609. This rule will not, however, prevent the party claiming the benefit of the admission from disproving the fact so alleged in connection with it. So far as the statement is not disproved, it is effectual; so far as it is shown to be untrue, it is of no avail. *Ibid*.

An admission of a legal conclusion is not binding on the court) *Cutting v. Lincoln*, 9 Abb. Pr. N. S. 436, 3 Wait, L. & Pr. [5th ed.] 396; and where an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney or as a matter of proof on the hearing, it cannot be retracted on a subsequent trial unless by leave of the court. *Owen v. Curley*, 36 N. Y. 600; *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40; *Doe v. Bird*, 7 Car. & P. 6.

Whatever is admitted by a pleading cannot be contradicted in a subsequent pleading, nor upon the trial, nor in a finding. *Cleveland v. Hatch*, 25 Hun, 308; *Paige v. Willet*, 38 N. Y. 28.

A party who fails to call attention at the trial to an implied admission in his favor in the pleadings, will not afterwards be permitted to avail himself of their benefit, even when overlooked by the court in consequence. *Williams v. Hayes*, 20 N. Y. 58.

Testimony given by a party on a former trial, during which he was examined as a witness for the adverse party, and which is directly contrary to his testimony in a second suit, may be given in evidence as an admission. *Pickard v. Collins*, 23 Barb. 44.



See generally on this topic, 3 Wait, L. & Pr. 84; 1 Rumsey, Pr. (1887) 272.

**b. Practice Rule Thirty-Eight.** Practice rule thirty-eight for the courts of equity for the United States, provides: "If the plaintiff shall not reply to any plea, or set down any plea or demurrei for argument, on the rule day when same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose."

An admission that a deed was executed is an admission that it was signed, sealed and executed delivered. *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Churchill v. Gardner*, 7 T. R. 592; *Binney v. Plumley*, 5 Vt. 500.

If the answer does not deny the allegations of a complaint which shows a cause of action, plaintiff may recover without evidence. *Bacon v. Cropsey*, 7 N. Y. 195.

An answer that plaintiff received the note as collateral from one to whom it was entrusted for a specific purpose, and that other parties claim it, does not deny the allegation of ownership in plaintiff. *Moody v. Andrews*, 7 Jones & S. 302; *Aff'd*, 64 N. Y. 641.

An admission by an indorser of the making, indorsement and transfer of a note does not contravene a denial of consideration or prevent proof that the indorsement was lent. *Powers v. French*, 1 Hun, 582.

A defendant who does not answer is not to be taken as admitting anything in an answer of a co-defendant. *Woodworth v. Bellows*, 4 How. Pr. 24. 1 Code Rep. (N. Y.) 29, Welles, J.

**c. Provisions of New York Code.** As to admissions by new matter, see authorities collated in 1 Bliss' New York Annotated Code, 266.

Each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. The New York Code, § 522, gives to such omission the force of a formal admission, and makes it conclusive as such upon the parties and upon the court. *Fleischmann v. Stern*, 90 N. Y. 111.

A party who admits by his pleading that which establishes the

plaintiff's rights will not be suffered to deny its existence or prove a state of facts inconsistent with that admission. It is not necessary to read the pleadings in evidence to enable a party to avail himself of an admission therein. *Dunham v. Cudlipp*, 94 N. Y. 129. *Walrod v. Bennett*, 6 Barb. 145.

**d. Admissions of Attorneys on the Trial.** The admissions of an attorney or counsellor on the trial of a case is evidence against the party represented by him, if it is done for the purpose of obviating the necessity of proving some fact on the trial or for convenience as to some matter of practice. *Chambers v. Mason*, 5 C. B. N. S. 59.

In some cases such admissions are conclusive and may be given in evidence upon a new trial, although prior to such trial the party gave notice that he intends to withdraw them, or though the pleadings are altered, provided the alterations do not relate to the admissions. *Langley v. Oxford*, 1 Mees. & W. 508.

As in other instances the admission of an attorney in order to conclude his client must be intended and understood as an admission; it must be within the scope of the authority usually delegated to an attorney at law in conducting legal proceedings.

Beyond this the authority of the attorney does not extend and statements made by counsel in summing up a case which are beyond and outside of his authority to make, cannot be given in evidence upon another trial, especially if it does not appear that his client was present and heard the statement made. *Adee v. Howe*, 15 Hun, 20; *Weisbrod v. Chicago & N. W. R. Co.* 20 Wis. 420.

It may be stated as a general rule that in the absence of fraud the acts and admissions of the attorney are binding upon his client (*Sampson v. Ohleyer*, 22 Cal. 200; *Chambers v. Hodges*, 23 Tex. 104); and unless an attorney be so situated as to excite the suspicion of the court his authority will not be questioned. *Taliaferro v. Porter*, Wright (Ohio) 611.

Nor is an admission in the answer of one available against the other. *Swift v. Kingsley*, 24 Barb. 541.

An admission made by an attorney, on the trial, is evidence against his client in that action, if it is done to save the necessity of proving some fact on the trial, or for convenience as to some matter of practice. *Chambers v. Mason*, 5 C. B. N. S. 59; *Haller v. Worman*, 9 C. B. N. S. 892; *Colledge v. Horn*, 3 Bing. 119;

*Talbot v. M'Gee*, 4 T. B. Mon. 377; *Pike v. Emerson*, 5 N. H. 393; *Alton v. Gilmanton*, 2 N. H. 488.

The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause; but to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases they are in general conclusive, and may be given in evidence, even upon a new trial (1 Greenl. Ev. § 186; *Gregory v. Parker*, 1 Campb. 394; *Paletthorp v. Furnish*, 2 Esp. 511, *note*; *Clifford v. Burton*, 1 Bing. 199, 8 Moore, 16; *Petty v. Anderson*, 3 Bing. 170; *Cotes v. Davis*, 1 Campb. 485); but other admissions which are mere matters of conversation with an attorney, though they relate to the facts in controversy, cannot be received in evidence against his client. *Young v. Wright*, 1 Campb. 139-141; *Elton v. Larkins*, 1 Mood. & R. 196; *Doe v. Richards*, 2 Car. & K. 216; *Watson v. King*, 3 C. B. 608.

If the admission is made before suit, it is equally binding, provided that it appear that the attorney was already retained to appear in the cause. *Marshall v. Cliff*, 4 Campb. 133.

§ 237. **Admissions of Third Parties.**—There are some instances in which a party is bound by the statements or admissions of a third person; usually such statements or admissions apply to other matters than those connected with pleadings in a civil cause. Still, under rare instances, the rule stated as follows may apply: Where a party is applied to for information in relation to an uncertain or disputed matter, and he refers the applicant to a third party, the answers of such third person will be competent evidence against the party making such reference. *William v. Innes*, 1 Campb. 364-366, *note*; *Hood v. Reeve*, 3 Car. & P. 532; *Bedell v. Commercial Mut. Ins. Co.* 3 Bosw. 147; *Wehle v. Spelman*, 1 Hun, 634.

The rule on this subject is that when a person refers to another for an answer on a particular subject, the answer is in general evidence against him, since he makes such third person his accredited agent for the purpose of giving the answer. *Marcy, J.*, in *Duval v. Covenhoven*, 4 Wend. 561.

The declarations of a third person referred to by a party are

not evidence against such party, unless strictly within the subject matter in relation to which the reference is made. *Ibid.*

§ 238. **Admissions of Former Owner of Land.**—Declarations of a deceased former owner of land are admissible, even though they make in his favor. *Daggett v. Shaw*, 5 Met. 223; *Wood v. Foster*, 8 Allen, 24; *Niles v. Patch*, 13 Gray, 254; *Long v. Colton*, 116 Mass. 414.

Declarations of a party in disparagement of his title are admissible against him (*Church v. Burghardt*, 8 Pick. 327; *Kellenburger v. Sturtevant*, 7 Cush. 465; *Flagg v. Mason*, 2 New Eng. Rep. 162, 141 Mass. 64); and the rule extends to declarations made by a former owner, under whom the present owner claims. *Tyler v. Mather*, 9 Gray, 177; *Osgood v. Coates*, 1 Allen, 77; *Blake v. Everett*, 1 Allen, 248; *Chapman v. Edmands*, 3 Allen, 512; *Pickering v. Reynolds*, 119 Mass. 111; *Simpson v. Dix*, 131 Mass. 179; *Rowell v. Doggett*, 3 New Eng. Rep. 756, 143 Mass. 483; *Holmes v. Turners Falls Lumber Co.* 6 L. R. A. 383, 150 Mass. 535.

The admissions of the real party in interest, against the validity of a claim, though made before he became the owner of a claim, are admissible and competent as tending to prove a defense in a suit founded upon such claim; and it is error to limit the declarations to merely impeaching testimony. *Com. v. Susquehanna & D. R. Co.* 1 L. R. A. 225, 122 Pa. 306.

The above decisions harmonize with the principles already established, and indicate the disposition of the courts to confine parties strictly, to the effect of such admissions as they see fit to make, which in many instances influence the actions of innocent third parties, and place them in compromising attitudes they would not otherwise assume, but for the impulse given to those actions by the admissions made.

a. **Of Party in Possession of Land.**—The admission of a person in possession of land made under a mistake of law, and which are wholly inconsistent with his written evidence of title, cannot be received for the purpose of destroying his title to the land. *Hawley v. Bennett*, 5 Paige, 104, 3 L. ed. 646. Declarations of one in possession of land in assertion of his own title are inadmissible, if not within the rule of the *res gestæ*. *Tuttle v. Ball*, 4 N. Y. Week. Dig. 30. Whenever admissions of one having or claiming title to real estate would be competent against him, they are competent against persons subsequently deriving title through

or from him. *Chadwick v. Fonner*, 69 N. Y. 404. The principle upon which such evidence is received is that the declarant was so constituted that he probably knew the truth and his interests were such that he would not have made the admissions to the prejudice of his title, or possession, when they were true. The regard which one so situated would have to his own interest is considered sufficient security against a falsehood. In some of the states of the Union and in England the admissions of a prior owner, choses in action and other personal property characterizing or affecting his title are also admitted in evidence upon the same principle against those subsequently taking title from him. See *Jackson v. Bard*, 4 Johns. 230; *Pitts v. Wilder*, 1 N. Y. 525.

**b. Declarations of Grantor after Conveyance.**—Declarations of a grantor of lands subsequent to the conveyance are not admissible against the grantee. *Corl v. Corl*, 6 N. Y. Week. Dig. 52. So a party who has parted with his right or interest in property or choses in action by an absolute sale and assignment to another person cannot by his subsequent admissions affect the right of the purchaser. *Christie v. Bishop*, 1 Barb. Ch. 105, 5 L. ed. 316. Where the purchaser of mortgaged premises had admitted the existence of a lien within twenty years, and promised to discharge the mortgage, it was held sufficient to rebut the presumption of payment arising from the lapse of time. *Park v. Peck*, 1 Paige, 477, 2 L. ed. 721.

### § 239. Admissions Implied from Conduct.

**a. Language and Demeanor Considered.**—Admissions are frequently implied from the language and demeanor of the party making them; so, too, admissions may be implied from the acquiescence of the party; but to be given the force and effect of an admission the acquiescence must exhibit some decided act of the mind; an act that will amount to irresistible inference. It must appear that the party fully understood the language implied before any inference can be drawn from his passiveness or silence; as we have previously seen a party is not to be affected by statements, declarations and admissions made in a loose, rambling manner in his presence and under circumstances which do not properly allow of a reply; his surroundings may be such that a denial or a statement upon his part would be either impudent or useless, and the determining factor is, was he so situated as we can reasonably expect other men, under like circumstances to

make some protest or answer? His duty to speak out is largely governed by the correct apprehension of these facts; his situation is to be carefully considered, and before an admission can be imputed to his silence it must distinctly appear that the emergency and surroundings were such as to preclude any utterance on his part.

**b. Accounts Stated When Deemed an Admission.**—The principles governing an account stated require that the person against whom the account is rendered shall dispute or object to any or all of the items embraced within the account within a reasonable time; his failure to object is rightly construed as an admission, on his part, of correctness. An account stated or settled is a mere admission that the account is correct; it is not an estoppel; the account is still open for impeachment for mistakes or errors. Its effect is to establish *prima facie* the accuracy of the items without other proof to the party seeking to impeach it, is bound to show affirmatively the mistake or error alleged. The force of the admission and the strength of the evidence which will be necessary to overcome it will depend upon the circumstances of the case. An account stated, which is shown to have been examined by both parties and expressly assigned to or signed by them, without affording stronger evidence as to the correctness of its items than merely appearing that it had been delivered to the party or sent by mail acquiesced in for a sufficient length of time to entitle it to be considered an account stated. See *Champion v. Joslyn*, 45 N. Y. 653.

**c. Silence as Admission.**—Declarations or statements made in the presence of a party are received in evidence, not as evidence in themselves, but to understand what reply the party to be effected by the statement should make to the same. If he is silent when he ought to have spoken the presumption of acquiescence arises; in this sense, admissions may be implied from conduct. *Gibney v. Marchay*, 34 N. Y. 301.

**d. Passiveness as Admission.**—Admissions may also be implied from the acquiescence of the party; but acquiescence, to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. Whether it is acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully understood by the party, before any inference can be drawn from

his passiveness or silence. The circumstances, too, must be not only such as afford him an opportunity to act or speak, but such also as would properly and naturally call for some action or reply from men similarly situated. A party is not to be affected by statements made in his presence, under circumstances which do not properly allow a reply. In legal investigations, there is a regularity of proceedings which does not permit a party to interpose a denial how and when he pleases, as he would in a common conversation; and, in such cases the same inferences are not to be drawn from his silence or his conduct, as would otherwise be done. *Melen v. Andrews*, 1 Mood. & M. 336; *Rea v. Appleby*, 3 Stark. 33; *Broyles v. State*, 47 Ind. 251; *Wilkins v. Stidger*, 22 Cal. 231. But if the party does answer or make a reply, that may be given in evidence as an admission. *Jones v. Morrell*, 1 Car. & K. 266. So, a statement which is made in the plaintiff's hearing, although not in his presence, is admissible in evidence if it is otherwise receivable. *Neile v. Jukle*, 2 Car. & K. 709. The general rule that a declaration is good only as against the person making it, is subject to various limitations; and a statement by a person in the presence of his associates and acquiescence in by them, is admissible against them. *Lathrop v. Bramhall*, 3 Hun, 394.

If a party, to whom a note bearing his name is shown with a request to pay it, is silent, his silence is competent evidence that his signature is genuine, or if not genuine, of his assent to be bound by it. *Corser v. Paul*, 41 N. H. 24. A refusal to pay a bill because another person should pay part, is admissible as an admission of the authority of the agent who accepted it. *May v. Hewitt*, 33 Ala. 161.

**e. Distinction Outlined.**—A distinction is made between declarations made by a party and those made by a stranger. An omission to reply to the latter is not an implied admission of the truth of the statement, since the refusal to reply may be on account of the impertinence of the person who made it, and who is rebuked by silence. *Child v. Grace*, 2 Car. & P. 193. If a reply is made, that may be given in evidence. *Ibid.*

There may also be special circumstances calling for evidence on the part of the person to whom the conversation is addressed, which will prevent such silence from being construed as admission of the truth of statements made by the stranger. *Slattery v. People*, 76 Ill. 217.

A statement made in the presence of a party to the action becomes evidence, as showing that the party, on hearing such a statement, did not deny its truth. Such statements are received as evidence, not as evidence themselves, but to understand what reply the party to be affected by the statements shall have made to it. If he is silent when he ought to have denied, the presumption of acquiescence arises. *Gibney v. Marchay*, 34 N. Y. 301-305.

### § 240. Admission of Principal when Binding on Surety.

**a. Rationale of Rule.**—Upon the most obvious principle of equity the surety whose obligation has been secured through certain and positive averments of existing facts should not be affected or placed in any situation of disadvantage by reason of subsequent admission made by his principal. This is a general rule of recognized standing. It is, however, subject to the one qualification, viz., that where the admissions or statements are made by the principals at the time the transaction was under discussion that resulted in the surety's connection with the case, then and in that event the admissions of the principal may be regarded as binding upon the surety. *Dunn v. Slee*, Holt, 399.

Adjudications sustaining this proposition of the text, if not numerous, are at least convincing. In a *nisi prius* case, *Cutler v. Newlin*, cited in 3 Stark. Ev. 1387, a most eminent judge, Holroyd, refused the admission of the principal in an indemnity bond going to show the amount of damage. In strict harmony with this decision are the cases of *Hotchkiss v. Lyons*, 2 Blackf. 222; *Shelby v. Governor*, 2 Blackf. 289; *Beall v. Beck*, 3 Harr. & McH. 242; *Bacon v. Chesney*, 1 Stark. 192. These cases all hold that the declarations of the principal bind the surety only when they are part of the *res gestæ* in reference to which the surety has covenanted, but that his subsequent admissions, not part of the *res gestæ*, do not bind and are not competent evidence against the surety.

It is a very clear proposition on principle and authority that sureties upon the bond of a public officer are liable only for defaults committed by him after the commencement of the term of office for which they became his sureties, and that if it should so happen that the same individual had previously held the same office under a prior appointment and committed the faults during the term of that appointment, those who were his sureties on such



prior appointments must be looked to for such defaults, and not those who signed his bonds upon his reappointment. Their engagement is for his future and not for his past conduct, and it would be a gross imposition upon them in the absence of a special stipulation to that effect, to import into their undertaking the responsibility for prior delinquencies. This principle has been frequently recognized. *Myers v. United States*, 1 McLean, 493; *Farrar v. United States*, 30 U. S. 5 Pet. 373, 8 L. ed. 159; *United States v. Boyd*, 40 U. S. 15 Pet. 187, 10 L. ed. 706; *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199; *Mahaska County v. Ingalls*, 16 Iowa, 81.

**b. Rule as Between Parties.**—Where certain persons as principals and others as sureties have bound themselves for the payment of any deficiency remaining after the assets of a co-partnership had been applied to the payment of the firm debts, the admissions of the principal as to the amount of such deficiency made in the absence of the sureties are not evidence as against them. *Horn v. Perry*, 14 Hun, 409. *Mr. Justice Nelson* has embodied the sentiments of the United States Supreme Court on this important topic in the following conclusive language: “The sureties cannot be concluded by fabricated account of their principal with his creditors. They may always inquire into the realities and truth of the transactions existing between them. The principle has been asserted and been applied by this court in several cases.”

#### § 241. Admissions of Former Owner of Personal Property.

Former owners of personal property are frequently interested in the merits or demerits of some litigation that may occur incidental to its transfer; they are frequently offered as witnesses, and their admissions and declarations are sought to be established as affecting various parties in the suit. It is a well recognized rule of evidence that such admissions are not admissible as against the vendee, as to the title of the property sold.

This principle receives full indorsement in the case of *Hurd v. West*, 7 Cow. 752. “The declaration or admission of a vendor of personal property, though made before sale, are not evidence against the vendee, but the vendor should be called as a witness.” Starkie, in his *Treatise on Evidence*, says the “admission of an owner is sometimes evidence against one who claims through him.” (4 Stark. Ev. 48.) This seems to

be an exception to the general rule, which is, I apprehend, against receiving the admission of a vendor, to affect the rights of a vendee, though such admissions be made previous to the sale. In trespass *de bonis asportatis*, by Ivat against Finch and another, the defendants claimed that they had rightfully taken the goods in question upon a heriot custom, as the goods of Alice Watson, deceased, the tenant; and the only question was, whether she owned them at the time of her death. To prove that she did not, it was held that the plaintiff might show her declaration made sometime before her death, that she had sold them to him. Mansfield, *Ch. J.*, said the admission was against her interest; and had the action been by the plaintiff against her, the admission would clearly be evidence; and ought, therefore, to be received against the defendants whose right depended upon her title. *Ivat v. Finch*, 1 Taunt. 141. The principle stated here is broad enough to let in such an admission, generally, against all claiming under an owner of personal property, if the admission be made previous to the time when the title of the claimant accrued. But the case itself is of an admission by a deceased owner. Her testimony could not be obtained; and her admission was therefore to be received as the next best evidence. That such was the principle of that case is the more probable from a previous *nisi prius* decision (*Duckham v. Wallis*, 5 Esp. 252) with which it would otherwise be at war. That was an action by the indorsee against the acceptor of a bill of exchange. It was indorsed by Evans, the holder, when overdue; so that Evans stood as vendor, and the plaintiff as vendee, claiming no more than Evans' rights. This was admitted; and to show that the defendant had, while Evans owned the bill, discharged and settled it with him in account, his (Evans') declarations were offered in evidence against the plaintiff. Lord Ellenborough held the evidence inadmissible. He said the fact of the bill having been paid when due, and settled in account, was easily proved by calling Evans himself, or by the evidence of third persons. But what Evans said was not the best evidence, when he himself could be called. It would be making the declarations of a third person evidence to affect the plaintiff's title when that party was not on the record, and therefore could not be received.

§ 242. **Admission of Assignor.**—It is a logical and indeed a necessary corollary of the principle sought to be established

in the text, that an assignor, who has made an assignment for the benefit of creditors, cannot by his admissions furnish evidence of his own fraudulent intent, or that of his trustee. When such declarations or admissions are made out of court after the execution and delivery of the assignment and the entry of the trustees upon the performance of the trust by taking possession of the assigned property. *Hanna v. Curtis*, 1 Barb. Ch. 263, 5 L. ed. 378; *Cuyler v. McCartney*, 40 N. Y. 221; *Weinrich v. Porter*, 47 Mo. 293. The New York Court of Appeals by Earl, J., in the case of *Truax v. Slater*, 86 N. Y. 630, holds that mere declarations of an assignor of a chose in action forming no part of any *res gestæ* are not competent to prejudice the title of his assignee. Whether the assignee be one for value or merely a trustee for creditors; and whether such declarations be antecedent or subsequent to the assignment, the same court held that after the execution and delivery for the benefit of creditors, the assignor, for the purpose of defeating the claim of the trustees, to hold and administer the property according to the trust, cannot invalidate the assignment. *Mr. Justice Finch* has also held that evidence and the declarations of the assignor made after the assignment, acceptance and delivery of possession under it, were properly excluded. *Coyne v. Weaver*, 84 N. Y. 386.

It would be contrary to principle to permit a title to chattels or choses in action to be effected by the declarations of any third party made after its inception. *Phoenix v. Dey*, 5 Johns. 412; *Doe v. Webber*, 1 Ad. & El. 733.

### § 243. Admissions Made with View to Compromise.

a. **Statement of Lord Mansfield.**—Admissions, declarations, etc., made an attempt to compromise suits are inadmissible against the party making them, as the statement of plaintiff that his attorney was interested in the claim to show his interest in order to exclude him as a witness. *Williams v. Thorp*, 8 Cow. 201. It is the policy of the law to foster and encourage all designs having for their object the pacification of controversy and amicable adjustment of disputes. To this end, confidential overture designed to effect such a result are protected, and are not admissible in evidence as admissions. *Cory v. Bretton*, 4 Car. & P. 462. The rule is founded upon the most salutary principles and is stated by *Lord Mansfield* thus: "It must be permitted to all men to buy their peace without prejudice to them should the

offer not succeed, such offers being made to stop litigation without regard to the question whether anything is due or not. That no advantage shall be taken of offers made by way of compromise, that a party may, with impunity, attempt to buy his peace are well established rules of law. *Taylor v. Jones*, 2 Campb. 106; *Laurence v. Hopkins*, 13 Johns. 288, *note*, to which our reason and our feelings at once assent. But I am not prepared to admit that what a party may state as a fact, though the statement may be made in the course of a negotiation for a compromise, or may be connected with an offer to purchase peace, will not be as binding as if the fact had been disclosed in any way. If a man says to me, I do not admit that I owe you anything, but rather than be sued I will give you a hundred dollars, it would be most unjust to suffer me to avail myself of this offer to recover against him. But if he tells me, it is true, I justly owe you a hundred dollars, and will give you fifty if you will give up your debt, I apprehend there is no rule of law so absurd and unjust as to prevent my availing myself of my debtor's confession, because he connected with it an offer of compromise."

**b. Views of Mississippi Supreme Court.**—The Mississippi Supreme Court in a recent case has held that where a condition accompanies the offer to compromise, such offer cannot be regarded as an admission (*Read v. McLemore*, 34 Miss. 110); and an offer to pay a debt in goods instead of money is not an offer to compromise. *Ferry v. Taylor*, 33 Mo. 323.

Evidence of the admission of a debt and an offer to confess judgment in a suit pending if time would be given for payment of a part of the debt does not come within the principle which excludes offers to pay by way of compromise upon a disputed claim or to buy peace, and is admissible. *M'Niel v. Holbrook*, 37 U. S. 12 Pet. 84, 9 L. ed. 1009.

## § 244. Admissions to Prove Partnership.

**a. Not Evidence After Debt Incurred.**—Declarations of defendants sought to be charged as a partner, that he was not a partner, made to plaintiff after the partnership debt was incurred, are not evidence conclusive of the fact.

Depositions which related to the declarations of such parties, that he was not such partner, not made in plaintiff's presence are inadmissible. *Teller v. Patten*, 61 U. S. 20 How. 125, 15 L. ed. 831.

A declaration or admission by a person that he is a partner, is evidence against him, and will, as far as he is concerned, be evidence of the existence of the partnership. Therefore, words uttered or letters written in the course of commercial transactions, are constantly received in evidence, to charge the speaker or writer as a partner. *De Berkom v. Smith*, 1 Esp. 29; *Gibbons v. Wilcox*, 2 Stark. 39; *Parker v. Barker*, 3 Moore, 226; *Shott v. Strealfeld*, 1 Mood. & M. 9; *Williams v. Mudie*, 1 Car. & P. 158; *Champlin v. Tilley*, 3 Day, 306; *Mitchell v. Roulstone*, 2 Hall, 351; *Thommon v. Kalbach*, 12 Serg. & R. 238; *McGregor v. Cleveland*, 5 Wend. 477; *Reynolds v. Cleveland*, 4 Cow. 282; *McPherson v. Rathbone*, 7 Wend. 216, 11 Wend. 96; *Grant v. Shurter*, 1 Wend. 148; *Halliday v. McDougall*, 20 Wend. 81; *Gowan v. Jackson*, 20 Johns. 176; *Whitney v. Ferris*, 10 Johns. 66.

The mere acknowledgement of two partners that a third person was a co-partner, is not sufficient to charge him. *Whitney v. Sterling*, 14 Johns. 215; *Miller v. M'Clenachan*, 1 Yeates, 144; *Corps v. Robinson*, 2 Wash. C. C. 388; *McPherson v. Rathbone*, 7 Wend. 216; *Robbins v. Willard*, 6 Pick. 464; *Martin v. Kaf-froth*, 16 Serg. & R. 120.

**b. Of General Reputation.**—General reputation, standing alone and not offered in corroboration of facts and circumstances, is inadmissible in evidence to prove a partnership. *Quære*, whether it be admissible even as auxiliary evidence. *Halliday v. McDougall*, 20 Wend. 81; *McPherson v. Rathbone*, 11 Wend. 96; *Gowan v. Jackson*, 20 Johns. 176.

Admissions or declarations of a person may be given in evidence against him, to show that he is a partner in the firm; but the declarations of one person, that another person is a partner, are not legal evidence as to the latter. They are evidence only against those who make them. *Kirby v. Hewitt*, 26 Barb. 607; *Davidson v. Hutchins*, 1 Hilt. 123.

Such evidence is incompetent, except against declarant, unless in connection with other prima facie evidence that the other person was a partner with declarant, or authorized him to make the statement, or was aware of it and was silent. *Pleasants v. Fant*, 89 U. S. 22 Wall. 120, 22 L. ed. 782; *Robins v. Warde*, 111 Mass. 244; *Donley v. Hall*, 5 Bush, 549; *Johnson v. Gallivan*, 52 N. H. 143; *Van Eps v. Dillaye*, 6 Barb. 244; *Barcroft v. Haworth*, 29 Iowa, 462. The declaration does not really corroborate as

against the others, but it ceases to be error to receive it against them. *Gardner v. Northwestern Mfg. Co.* 52 Ill. 367.

General reputation, common rumor, belief or opinion of witness founded on hearsay is not competent evidence of partnership. *Bowen v. Rutherford*, 60 Ill. 41; *Brown v. Crandall*, 11 Conn. 93; *Turner v. McIlhaney*, 8 Cal. 575; *Tumlin v. Goldsmith*, 40 Ga. 221; *Hicks v. Cram*, 17 Vt. 449.

The English cases on this subject are collated in a foot note to *Teller v. Patten*, 61 U. S. 20 How. 125, 15 L. ed. 831.

§ 245. **Admission in Deeds, Estoppel.**—The mere fact that an admission was made under oath does not of itself render it conclusive against the party, but it adds greatly to the weight of the testimony, throwing upon the party making it the burden of showing that it was a case of clear and innocent mistake.

Admissions in deeds, as between the parties and their privies, are generally regarded as estoppels, if properly pleaded, and when not technically so, they are entitled to great weight from the solemnity of their nature. But when offered in evidence by a stranger, the adverse party may repel their effect in the same manner as though they were only parol admissions.

Receipts or other acknowledgments, given for goods or money, whether on separate papers or indorsed on deeds, or on negotiable securities, the adjustment of a loss on a policy of insurance, made without full knowledge of all the circumstances, or under a mistake of law or fact, or under any other invalidating circumstances, and accounts rendered, such as an attorney's bill and the like, do not estop the party making them from denying the facts therein stated. *Reyner v. Hall*, 4 Taunt. 725, and cases cited; *Wood*, Pr. Ev. § 186.

#### § 246. **Admissions Discredited How.**

a. **No Limitation.**—There is no limitation upon a party to introduce evidence to contradict the truth of his own admissions, where such admissions were retrospective, and not operating by way of an estoppel. *Curland v. Day*, 4 E. D. Smith, 251; *Young v. Bushnell*, 8 Bosw. 1; *Young v. Foute*, 43 Ill. 33.

Where an admission is voluntarily and deliberately made, and it is satisfactorily proved, it may be strong evidence against the party making it. *Sawland v. Green*, 40 Wis. 431.

The force and efficacy of admissions may be largely neutralized by showing that they were made under a mistake of law, provided

the other party has not been induced to change his condition to his detriment in consequence. *Newton v. Liddiard*, 12 Q. B. 925; *Newton v. Belcher*, 12 Q. B. 921; *Heane v. Rogers*, 9 Barn. & C. 577; 3 Wait, L. & Pr. (5th ed.) 418.

**b. Admission When Conclusive.**—An admission or declaration is never conclusive, whether made in writing or verbally, as a mere admission or declaration not acted upon. It may become so, or rather the party may be estopped from contracting it as against one who has acted on the faith of it and has parted with property, relying upon the truth of the statement. But admissions and receipts, as such, are always open for any mistake, error or false statement contained in them. In a word, they may always be contradicted, varied or explained by parol testimony. 1 Phil. Ev. 107, Cow. & Hill's Notes, 213, note 194; 3 Stark. Ev. 1271; *Tobey v. Barber*, 5 Johns. 68; *Ellis v. Willard*, 9 N. Y. 529.

A receipt is frequently held to be an admission against the party giving it, and when it is not in the nature of a contract parol evidence is admissible to explain or modify it.

A receipt in these words "Received payment of M. K. & Co.'s note, four months," may be explained or modified by parol evidence. *Buswell v. Pioneer*, 37 N. Y. 312.

**c. Rebuttal of Evidence of Admission.**—A party cannot rebut the evidence of his own admissions by different declarations made at other times, but he may show that they were not true. The declarations of a party that he had promised four horses to a stage line are not evidence sufficient to warrant the inference that he was a joint proprietor, and it is competent to repel all inferences to his prejudice by showing that he actually sold three horses to the agent of the ostensible proprietor of the line. *Auderson v. Snow*, 9 Ala. 247.

**d. Miscellaneous Instances.**—Although the declarations or admissions of a party are evidence against himself, yet they do not, when offered, justify him in introducing proof of his counter declarations, made at different times, unless the latter form a part of the *res gestæ*. *Roberts v. Trawick*, 22 Ala. 490. He may show that he made them jocularly. *Beebe v. De Baun*, 8 Ark. 510.

Verbal admissions hastily made without investigation and in ignorance of material facts in the case, are not binding when the

facts to the contrary are unequivocally established. *Martin v. Peters*, 4 Robt. 434.

Where an admission was on the authority of a decision, which has been overruled, and was to the prejudice of the party making it, he is held not to be bound by it. *Hays v. Cage*, 2 Tex. 501; Wood, Pr. Ev. § 162.

The rule that statements made in the presence and hearing of a person uncontradicted by him are implied admissions has no operation when the party is under arrest at the time. *State v. Howard*, 102 Mo. 142.

The admissions of a bank cashier as to the amount which he owes the bank are competent evidence in an action to recover such indebtedness from the sureties of his official bond. *McShane v. Howard Bank*, 10 L. R. A. 552, 73 Md. 135.

An admission by one of two defendants who have answered separately, of a partnership between them, is admissible against himself. *Vannoy v. Klein*, 122 Ind. 416.

A wife claiming that her abandonment of her home was caused by the conduct of her husband must, in the fact of his denial, if she seeks a divorce on the ground of desertion, sustain her claim by the corroborative evidence of circumstances or of other witnesses. *Herold v. Herold*, 9 L. R. A. 696, 47 N. J. Eq. 210.

The deliberate admissions of a defendant, if sufficiently clear, full and precise, and relative to existing facts, and not to mere intention, are competent to establish an actual gift by deceased *in presenti*. *Sourwine v. Claypool* (Pa.) 21 Pittsb. L. J. N. S. 146.

§ 247. **Admissions Against Interest.**—"The fact that an admission is against the interest of the party who made it, always raises a very strong presumption that it is true, and notwithstanding the fact that it sometimes happens that a party makes a false statement, which he believes at the time to be for his own advantage, although it afterwards turns out to the contrary, yet even under such circumstances it is no more than right that the fact of his having made such a statement should be given in evidence, if for no other purpose, at least to throw upon him the burden of explaining it, and thereby showing his disposition to depart from the truth when he considers that his interests will be subserved by such a course." Reynolds, Theory of Law of Ev. § 19.

Any review of this subject is conspicuously deficient without a reference to the exhaustive opinion of *Mr. Justice Story* in *Nich-*



*olls v. Webb*, 21 U. S. 8 Wheat, 326, 5 L. ed. 628, decided in 1823. The case itself was one of exceptional interest, was argued by eminent counsel, the decision was by an undivided court, and the distinguished jurist who wrote for affirmance may be said to have exhausted the subject, in that neither comment nor cavil has ever arisen during the period of seventy years the rule there proclaimed and expounded has been in force. From that opinion I excerpt the following:

“The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts of law are therefore extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious that as the rules of evidence are founded upon general interest and convenience, they must from time to time, admit of modifications to adapt them to the actual condition and business of men, or they would work manifest injustice; and *Lord Ellenborough* has very justly observed that they must expand according to the exigencies of society. *Pritt v. Fuirclough*, 3 Campb. 305. The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of bills of exchange and promissory notes. The rules of law require that due notice and demand shall be proved, to charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these important facilities to commerce, since few persons would be disposed to risk such property upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses. There is no doubt that, upon the principles of law, protests of foreign bills of exchange are admissible evidence of a demand upon the drawee; and upon what foundation does this doctrine rest, but upon the usage of merchants and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers acting as the agents and instruments of private parties.

The general objection to evidence, of the character of that now before the Court, is that it is the nature of hearsay, and the party

is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is that it is the best evidence the nature of the case admits of. If the party is dead we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard us against the effects of human mortality. Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment are not admissible after their death the mischiefs must be very extensive." *Nicholls v. Webb*, 21 U. S. 8 Wheat. 326, 5 L. ed. 628. The opinion declares broadly and without proviso or exception a rule that is now well recognized.

In so far as a statutory form of expression is deemed advisable, *Sir James Stephen* may be presumed to have met the most critical requirements in his statement of the English rule; his language is in the manner following:

"A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest. The whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.

"A declaration may be against the pecuniary interest of the person who makes it, if part of it charge him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and (it seems) though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part.

"A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.

"An indorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on

behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation; but any such declaration made in any other form by or by the direction of the person to whom the payment was made, is when such person is dead, sufficient proof for the purpose aforesaid.

“Any indorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made; but it is uncertain whether the date of such indorsement or memorandum may be presumed to be correct without independent evidence.

“Statement of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.” Stephen, Dig. art. 28.

### § 248. The English Rule.

**a. Admissions by Strangers.**—This entire subject of admission as applied to this immediate connection is disposed of by *Sir James Stephen*, in a somewhat summary manner which has nevertheless met with the entire approval of the English jurists who have been called upon to weigh its effect and give force and consistency to the provisions; the text is appended in full.

“Statement by strangers to a proceeding are not relevant, as against the parties, except in the cases hereinafter mentioned.

“In actions against sheriffs for not executing process against debtors, statements of the debtor’s admitting his debt, to be due to the execution creditor, are deemed to be relevant as against the sheriff.

“In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor’s debt, is deemed to be relevant as against the defendant.” Stephen, Dig. art. 18.

**b. Admissions of Person, Referred to by Party.**—“When a party to any proceeding expressly refers to any person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.” Stephen, Dig. art. 19.

**c. Admissions made Without Prejudice.**—“No admission is deemed to be relevant in any civil action if it is made either upon

an express condition that evidence of it is not to be given, or under circumstances from which the judge infers that the parties together agreed together that evidence of it should not be given, or if it was made under duress." Stephen, Dig. art. 20.

§ 249. **Miscellaneous Topics on the Subject.**—An admission of what a person said about his indebtedness to another is competent evidence upon that question between those parties, but not as to the third person not present at the time of the admission. *Overstreet v. Manning*, 67 Tex. 657.

Admissions in letters written after the date of the deed are admissible in evidence in a suit to vacate the deed for fraud. *Canton v. McGraw*, 10 Cent. Rep. 137, 67 Md. 583.

Admissions in an affidavit for continuance may be used against defendant. *Behler v. State*, 11 West. Rep. 104, 112 Ind. 140.

An offer of compromise of a legal controversy, not accepted, is not competent evidence for or against either party. Authorities cited in *Louisville, N. A. & C. R. Co. v. Wright*, 13 West. Rep. 806, 115 Ind. 378; *Binford v. Young*, 13 West. Rep. 815, 115 Ind. 174.

If the object of the party making an offer was to buy his peace, which is impliedly manifested by a mere proposition to pay a sum in settlement, it is deemed to have been made without prejudice, and is not admissible in evidence. *International & G. N. R. Co. v. Ragsdale*, 67 Tex. 24.

Evidence that before a suit for damages for injuries inflicted by a vicious dog was brought, the defendant offered the party injured money, is admissible to show an admission of liability, if not made confidentially or for the sake of peace. *Brice v. Bauer*, 11 Cent. Rep. 327, 108 N. Y. 428.

The fact that some things may have been said in a conversation, which witness did not hear, does not render his testimony as to what he did hear inadmissible. *Denver & R. G. R. Co. v. Neis*, 10 Colo. 56.

Declarations of deceased disinterested parties who were in a position to know are admissible to establish boundary. *Tucker v. Smith*, 68 Tex. 473.

Much latitude is allowed in the introduction of evidence as to the birth, age, and death of a person. Evidence of an inscription on a tombstone may be admissible. *Smith v. Patterson*, 14 West. Rep. 757, 95 Mo. 525.

The existence of a partnership cannot be proved by common report or general reputation. *Marble v. Lypes*, 82 Ala. 322.

The admissions of a partner while engaged in the adjustment of partnership business after the dissolution of the firm, may be given in evidence to charge the other partners in relation to such business. *Feigley v. Whitaker*, 22 Ohio St. 606, 10 Am. Rep. 778; *Wood v. Braddick*, 1 Taunt. 104.

The above doctrine, as laid down in *Wood v. Braddick*, is approved by the English common law decisions and in many American cases. *Simpson v. Geddes*, 2 Bay, 533; *Joslyn v. Smith*, 13 Vt. 353; *Cady v. Shepherd*, 11 Pick. 400; *Shelton v. Cocke*, 3 Munf. 191; *Mann v. Locke*, 11 N. H. 246; *Gay v. Bowen*, 8 Met. 100; *Brewster v. Hardeman*, Dudley, 138; *Parker v. Merrill*, 6 Me. 41; *Lacy v. McNeile*, 4 Dow. & R. 7; *Whitcomb v. Whiting*, 2 Dougl. 652; *Pritchard v. Draper*, 1 Russ. & M. 191; *Jackson v. Fairbank*, 2 H. Bl. 340; *Garland v. Agee*, 7 Leigh, 362; *Bridge v. Gray*, 14 Pick. 55; *Vinal v. Burrill*, 16 Pick. 401; *Ide v. Ingraham*, 5 Gray, 106; *Beardsley v. Hall*, 36 Conn. 270; *Wheelock v. Doolittle*, 18 Vt. 440; *Shepley v. Waterhouse*, 22 Me. 497.

The broad doctrine of *Wood v. Braddick* has been disapproved in many American cases, especially in New York, Kentucky, Illinois, Indiana and Missouri, and also by the Supreme Court of the United States. *Bell v. Morrison*, 26 U. S. 1 Pet. 351, 7 L. ed. 174; *VanKeuren v. Parmelee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 176; *Mason v. Howell*, 14 Ark. 199; *Belote v. Wynne*, 7 Yerg. 534; *Levy v. Cadet*, 17 Serg. & R. 126, 17 Am. Dec. 650; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Muse v. Donelson*, 2 Humph. 166.

Declarations of a partner after dissolution cannot charge partnership with a debt; if existence of debt be proved *aliunde*, and the original liability, such declarations would be sufficient to remove bar of Statute of Limitations. *Willis v. Hill*, 2 Dev. & B. L. 231, 31 Am. Dec. 412; *Falls v. Sherrill*, 2 Dev. & B. L. 371; *Walton v. Robinson*, 5 Ired. L. 341; *Hubbard v. Marsh*, 7 Ired. L. 204, statute now changes this, (Bat. Rev. chap. 17, § 50); *Greenleaf v. Quincy*, 12 Me. 11, 28 Am. Dec. 145; *Whitcomb v. Whiting*, 2 Dougl. 652; *McIntire v. Oliver*, 2 Hawks, 209, 11 Am. Dec. 760.

The tendency of American decisions is now believed to be contrary to this doctrine. See *contra* cases last above cited. Angell,

Lim. § 260; *Houser v. Irvine*, 3 Watts & S. 247; *Hogg v. Orgill*, 34 Pa. 348.

Admission of indebtedness by partner after dissolution will not of itself bind other partners. *Charlton v. Oliphant*, 3 Brev. 183, 6 Am. Dec. 572; *Lang v. Waring*, 17 Ala. 157.

Partner's admissions after dissolution of firm in regard to partnership demand, are competent, though not conclusive evidence. *Cady v. Shepherd*, 11 Pick. 400, 22 Am. Dec. 379.

Payment of interest by one partner on firm note after dissolution has been held to take the note out of the Statute of Limitations. *Merritt v. Day*, 38 N. J. L. 32, 20 Am. Rep. 362.

A surviving partner cannot bind estate of deceased partner for debts created after his decease. *Cock v. Carson*, 45 Tex. 429.

After dissolution a partner cannot appear for partner in a suit brought against the partners for a firm debt (*Lall v. Lanning*, 91 U. S. 160, 23 L. ed. 271; *Loomis v. Pearson*, 1 Harper, 470); nor before dissolution. *Haslet v. Street*, 2 McCord, L. 311.

Declarations of a partner after dissolution of the firm bind himself only. *Barringer v. Sneed*, 3 Stew. (Ala.) 201, 20 Am. Dec. 74; see *Tassey v. Church*, 4 Watts & S. 141, 39 Am. Dec. 65. Admission after dissolution by active partner, who has been appointed to settle firm business, that a certain firm debt is not paid, is evidence against co-partner. *Bridge v. Gray*, 14 Pick. 55, 25 Am. Dec. 358.

Admission by a partner, after dissolution, of an account or of a debt, is not competent evidence against a copartner. *Baker v. Stackpoole*, 9 Cow. 420; *Atwood v. Gillett*, 2 Dougl. (Mich.) 216; *Lacoste v. Bexar County*, 28 Tex. 424; *Fontaine v. Lee*, 6 Ala. 891; *Brisban v. Boyd*, 4 Paige, 22, 3 L. ed. 324; *Bispham v. Patterson*, 2 McLean, 90; *Burns v. McKenzie*, 23 Cal. 102; *Whetmore v. Murdock*, 3 Woodb. & M. 386; *Owings v. Low*, 5 Gill & J. 144; *Benedict v. Hecox*, 18 Wend. 502.

The admission in evidence of words and exclamations used in prayer, which inculcate the person who made the prayer, is not against public policy. *Woolfolk v. State*, 85 Ga. 69.

Declarations made by a party against his interests, relating to the subject matter involved in the litigation, are competent. *Bohr v. Neuenschwander*, 120 Ind. 449.

Evidence of declarations of a grantor after his conveyance is admissible to impeach the title of the grantee. *Rawson v. Plaisted*, 151 Mass. 71.

Evidence of the admission of a man in occupancy of land only as tenant by the courtesy is not admissible to effect the interest of his wife. *Fitzgerald v. Brennan*, 57 Conn. 511.

Declarations of a party in his own interest, not made in the presence of the person claiming adversely, are not admissible against the title of the latter. *Perry v. Perry*, 130 Pa. 94.

An admission as well as a confession, made under duress, is inadmissible, and it is equally well settled, that parol evidence was admissible to show that the execution of a certain contract, was induced by compulsion. These propositions are sustained by *Tilley v. Damon*, 11 Cush. 247 and *Black v. Wabash, St. L. & P. R. Co.* 111 Ill. 361.

In order to render the statements of a person admissible as dying declarations, such persons need not in express words declare that he knows he is about to die, or to make use of equivalent language. *Com. v. Matthews*, (Ky.) 11 Ky. L. Rep. 505.

Declarations of a testator just before his death, to his executor, as to what was intended by his will, which was made five years before such declaration, are not a part of the *res gestæ*. *Re Gilmore's Estate*, 81 Cal. 240.

Oral declarations of counsel in a judicial inquiry are not admissible in evidence as admissions of fact, so as to bind his client. *Anderson v. McAleenan* (C. P.) 29 N. Y. S. R. 406.

Self-serving declarations are not generally competent evidence. *Tobin v. Young*, 124 Ind. 507.

On the question of ownership of personal property, declarations made by one while in the full possession, control and use of the property indicating that he is the owner are admissible against one claiming under him. *Maus v. Bome*, 123 Ind. 522.

It is essential to the admissibility of dying declarations that at the time they were made declarant was in actual danger of death, that he had a full apprehension of his danger, and that death ensued. *Pulliam v. State*, 88 Ala. 1.

It is an obvious suggestion of reason that the admissions made by one partner after a dissolution in regard to the business of the firm previously transacted, should be binding on the firm. *Wilson v. McCormick*, 86 Va. 995.

And so the declarations of an agent are admissible when the agency is proved by evidence independent of the declarations. *Kirchner v. Laughlin* (N. M.) 23 Pac. Rep. 175.

Declarations of a partner in the course of a transaction on which

an alleged liability of the firm is based may be proved against the other partner. *Hess v. Lowrey*, 7 L. R. A. 90, 122 Ind. 225.

The general rule that declarations of a party made after he has parted with his interest in the subject matter cannot be received to disparage the right or title of one who acquired the same before such declarations, does not apply to transfers of property made for the purpose of defrauding creditors. *Smith v. Boyer*, 29 Neb. 76.

The fraudulent character of a conveyance being proved declarations and acts of the vendor, made shortly after the alleged transfer and before the rights of innocent parties intervened, are admissible as circumstances in corroboration of the fraud. *Ibid.*

Evidence of the statements of a husband for a sale of intoxicating liquors to whom his wife sues under a civil damage law, are inadmissible as against the wife, where she has not called the husband as a witness. *Judge v. Jordan* (Iowa) 46 N. W. Rep. 1077.

## § 250. Self-Serving Admissions of Predecessor in Title.

a. **Generally Inadmissible.**—Whether the admission of a previous owner of a chose in action can be proved against a purchaser from him, who has bought for a fair consideration, and between whom and the former owner there exists no other relation than that of purchaser and seller, has been a matter of discussion. It is not the case of a nominal purchase, the former owner retaining the equitable interest, but of an actual and complete transfer of all interest to the purchaser. On that question, *Paige v. Cagwin*, 7 Hill, 361, is a full authority. That case was ably considered by the court which determined it, and put an end to whatever doubts had been entertained upon the questions involved. *Stark v. Boswell*, 6 Hill, 405, was decided shortly after *Paige v. Cagwin*, and in its essential features was identical with the case before us; and the supreme court held the evidence of the mortgagee's admission inadmissible to effect the purchaser of the land under a sale on a statute foreclosure. In *Booth v. Swcezy*, 8 N. Y. 276, the point was again raised, and this court held the admissions of the mortgagee inadmissible against his assignee.

b. **Opinion of Ch. J. Folger.**—*Chief Judge* Folger held in a subsequent case that where several parties were interested in the use of the water in a particular stream, it was competent to show



what either of them said or did as to their relative rights in the presence and hearing of each other (*Crippen v. Morss*, 49 N. Y. 63); and, as we have seen, the acts and declarations of a party in possession of lands, as to the nature and extent of his interest, are competent evidence against any person claiming under him. *Pitts v. Wilder*, 1 N. Y. 525.

The juxtaposition of the two last cases cited, suggests a renewal of the warning as to the distinction between admissions affecting real and personal property.

Articles of personal property constituting a part of the wife's paraphernalia may be proved to have been such after the death of the husband, by evidence of his self-disserving declaration. *Moyer's App.* 77 Pa. 482; *Caswell v. Hill*, 47 N. H. 407; *Crane v. Wright*, 46 Ill. 107; *Bennett v. Camp*, 54 Vt. 36. Where the evidence shows the wife is acting as the husband's agent, he is bound by any admissions made by her within the scope of an agent's authority. *Carey v. Adkins*, 4 Campb. 92; *Meredith v. Footner*, 11 Mees. & W. 202; *Clifford v. Burton*, 1 Bing. 199; *Emerson v. Blonden*, 1 Esp. 142; *Pickering v. Pickering*, 6 N. H. 124; *Wheeler & W. Mfg. Co. v. Tinsley*, 75 Mo. 458; *Gebhart v. Burkett*, 57 Ind. 378; *Ripley v. Mason*, Hill & D. Supp. 66; *Mackinley v. M'Gregor*, 3 Whart. 369; *Murphy v. Hubert*, 16 Pa. 50; *Barr v. Greenawalt*, 62 Pa. 172; *Riley v. Suydam*, 4 Barb. 222; *Peck v. Ward*, 18 Pa. 506; *Stall v. Meek*, 70 Pa. 181; *Colgan v. Philips*, 7 Rich. L. 359; *Rochelle v. Harrison*, 8 Port. (Ala.) 351; *Lang v. Waters*, 47 Ala. 424; *Cantrell v. Colwell*, 3 Head, 471.

## CHAPTER XII.

### RELEVANCY.

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### § 251. The Term Defined.

a. **By Chief Judge Folger.**—The meaning of the word “relevant,” as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. Whatever testimony is offered, which would assist in knowing which party spoke the truth of the issue, is relevant; and when to admit it did not override other formal rules of evidence, it ought to be taken. In determining whether evidence is relevant all the issues must be kept in view as it may be admissible as to one though not as to another. *Platner v. Platner*, 78 N. Y. 90.

Testimony is relevant which has a tendency, however remote, to establish the probability of the fact in controversy. *Trull v. True*, 33 Me. 367.

b. **By Wait.**—“The object of every trial is to ascertain the truth of the allegations put in issue; and no evidence is admis-

sible which does not tend to prove or disprove such issues. It is not necessary that the evidence should bear directly upon the particular matters in issue, for the evidence offered may be relevant and material otherwise." 3 Wait, L. & Pr. 272.

**c. By Sir James Stephen.**—"The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other." Stephen, Dig. art. 1.

This last definition of the term is somewhat unsatisfactory, and it is difficult to understand why its distinguished author failed to incorporate the expressive language of his introductory chapter within the limits of the article quoted in so far as that language was applicable. No exposition of this topic has been attempted that rivals in conciseness and precision the following: "The facts which may be proved are facts in issue, or facts relevant to the issue.

"Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

"I. Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

"A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

"Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the Law of Evidence except in certain cases:

"1. Facts similar to, but not specifically connected with, each other. (*Res inter alios actæ*.)

"2. The fact that a person not called as a witness has asserted the existence of any fact. (Hearsay.)

"3. The fact that any person is of opinion that a fact exists. (Opinion.)

"4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (Character.)

"To each of those four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence.

"II. As to the manner in which a fact in issue or relevant fact must be proved.

"Some facts need not be proved at all, because the court will take judicial notice of them if they are relevant to the issue.

"Every fact which requires proof must be proved either by oral or by documentary evidence.

"Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

"Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

"Secondary evidence varies according to the nature of the document. In the case of private documents, a copy of the document, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves."

**d. By Reynolds.**—Whenever any fact or series of facts would, if true, conclusively establish the existence or non-existence of any fact relevant thereto, such fact or series of facts is always relevant, and proof thereof may be given in evidence; but when the effect of proving a fact offered in evidence would only be to render more or less probable the existence or non-existence of a fact in issue or relevant thereto, then the question of its admissibility becomes one of much more difficulty, and must be determined by the sound discretion of the judge under all circumstances of the case, according to the degree of light which it would throw upon the matter in issue, subject, however, to certain established rules, by which some classes of facts are required to be always admitted as relevant while some other classes are excluded as irrelevant. Reynolds' Theory of the Law of Evidence, § 5.

Condensed and simplified the averment holds good, that whatever facts are necessarily involved in any question submitted to a court for its determination, are said to be in issue, and evidence as to their existence or non-existence is always relevant.

Whenever any material fact is alleged in the pleading of a cause by either party and is denied by the other, that fact "is in issue;"

but in order that a fact may be in issue, it is not necessary that it be specifically alleged or denied in the pleadings; it is sufficient that it constitutes one of the component parts of a fact so alleged or denied. Reynolds' Theory of the Law of Evidence, § 6.

### § 252. Relevancy not the Sole Test of Admissibility.

a. **A Dissenting View.**—Mr. Chamberlayne, in his commentary upon Best's Principles of the Law of Evidence, vigorously dissents from some conclusions reached by Sir James Stephen. His assault upon the position taken by the English jurist, while perhaps ineffectual in an argumentative sense, has at least had the effect of emphasizing a distinction it is highly proper to observe, and but too frequently overlooked. The learned commentator said: "Logical relevancy is assumed by *Mr. Justice* Stephen throughout the Digest of Evidence to be the sole rational test of admissibility; that the two, relevancy and admissibility, are or ought to be co-extensive and interchangeable terms. This is certainly a mistake. Public policy, considerations of fairness, the practical necessity for reaching speedy decisions, these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant, and they must continue to do so. All admissible evidence, as has been said, *supra*, is relevant; but all relevant evidence is not therefore admissible. A communication to a legal adviser, or a criminal confession improperly obtained, may, undoubtedly, be relevant, in a high degree. They are none the less inadmissible." Best, Ev. 251, *note*, Chamberlayne's ed.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present and future existence or non-existence of the other. And a further quotation from Mr. Stephen, will develop the fact—

"That evidence may be given of any proceeding of any fact in issue,

"And of any fact relevant to any fact in issue, unless it is hereinafter declared to be deemed to be irrelevant,

"And of any fact hereinafter declared to be deemed to be relevant to the issue, whether it is or is not relevant thereto,

"Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to

him to be too remote to be material under all the circumstances of the case." See Stephen, Dig. art. 2.

Our first proposition is, that evidence is relevant and hence admissible when it conduces in any reasonable degree to prove a fact in issue. *Belden v. Lamb*, 17 Conn. 441.

Again: Where there is a spark of evidence of a fact, it ought not to be excluded from the jury. *Fitzwater v. Stout*, 16 Pa. 22.

**b. Views of United States Supreme Court.**—The entire question has been greatly simplified by an unmistakable formula from the United States Supreme Court. It is impossible to misconstrue such language as the following: "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. *Hart v. Newland*, 3 Hawks, 122. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evidence. And if they should happen to reach a wrong conclusion, the court has in its own hands the mode and measures of redress." *Home Ins. Co. v. Weile*, 78 U. S. 11 Wall. 438, 20 L. ed. 197.

**c. Evidence may be Rejected, When.**—Mr. Best insists that "evidence may be rejected as irrelevant for one of two reasons: 1st. That the connection between the principal and evidentiary facts is too remote and conjectural. 2d. That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered. The use of pleadings, or of some analogous statement of the cases of contending parties, is to enable the tribunal to see the points in dispute, and the parties to know beforehand that they should come prepared to attack or defend; consequently, although a piece of evidence tendered might, if merely considered *per se*, establish a legal complaint, accusation or defense, yet, as the opposite party has had no intimation before-

hand that the ground of complaint, etc., would be insisted on, the adducive evidence against him would be taking him by surprise and at a disadvantage." § 252.

d. **An Abandoned Definition.** It is a regrettable occurrence that an admirable definition once in vogue should have been repudiated by its author.

There are still able jurists who insist that *Sir* James Stephen's former definition of relevancy is preferable to the one now adopted.

In earlier editions of his *Digest* we find the following definition of relevancy:

"Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been, the cause of the other; the effect of the other; an effect of the same cause; a cause of the same effect; or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other, provided that such facts do not fall within exclusive rules and exceptions under them."

e. **Statutory Provisions of the California Code.**—The California Code of Civil Procedure at § 1870 tabulates a series of facts in logical sequence, proof of which may be given on the theory of their admitted relevancy; while not contending for any extraterritorial application of this special code provision, still, the wide recognition of the principle it embodies as well as the general indorsement it has received from jurists of acknowledged eminence and text-writers of high repute seem to entitle the section referred to in its entirety to credence and regard. The peculiar significance and applicability of these provisions will be at once apparent.

Evidence may be given upon a trial of the following facts:

1. The precise fact in dispute.
2. The act, declaration, or omission of a party, as evidence against such party.
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto.
4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person; the



act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death.

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.

\* \* \* \* \*

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.

\* \* \* \* \*

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary.

12. Usage to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation.

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family Bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree.

14. The contents of a writing, when oral evidence thereof is admissible.

15. Any other facts from which the facts in issue are presumed or are logically inferrible.

**f. The Rule in Connecticut.**—"This question of relevancy is always more or less intimately associated with every trial, and its improper reception frequently supports the main argument for reversal. The court should reach some positive convictions regarding the relevancy of proposed evidence, before admitting

it, but where the admissibility of evidence depends upon several facts, to some extent independent of each other, and where each fact must be proved to complete the chain of evidence, the exercise of a sound judicial discretion does not require the court, uniformly, to interfere in the order of the testimony. A beginning must be made somewhere; and when, as in the present case, the court is satisfied that the court is acting in good faith, and intends fairly to supply each particular link till the chain of testimony is perfect, the evidence, as offered, may come in, subject to objection, to be stricken out and go for nothing, if the necessary connecting portion be not supplied." *Foster, J. Moppin v. Etna A. & S. Co.* 41 Conn. 34.

g. **In Illinois.**—The rule is substantially similar to that in other jurisdictions, and in determining the relevancy of evidence, the question is not whether it is sufficient of itself to make out the cause of action, or establish the defense, but whether it tends to prove either what it does actually establish, or is subordinated to what it has a tendency to establish. This is the criterion upon which this entire subject should seek support. A close adhesion to the strict letter of this rule would amazingly simplify our appeal record and obviate much needless litigation and senseless controversy. *Hough v. Cook*, 69 Ill. 581.

In a subsequent decision the same court peremptorily refused to reverse the righteous judgment against a railway company although it was afflictively apparent and in fact conceded, that irrelevant testimony had been admitted in that the plaintiff was allowed to show that much trouble had been occasioned in his vicinity, with the defendant company regarding the right of way. *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58. A little more courage in this direction, on the part of our appellate courts, and we will notice an increasing respect for their decisions.

h. **Views of Chief Justice May.**—*Chief Justice May*, in his valuable annotation of *Stephen's Digest*, in a note appended to art. 2, has a valuable contribution upon the subject of relevancy:

"Although, when a relevant fact has greater or less weight in proportion to its remoteness in point of time, place, or other circumstance, it is sometimes held that the judge may, in his discretion, fix the limit beyond which it becomes of inappreciable weight, and reject it as immaterial, though relevant. This a practice liable to abuse, and, as there is no rule by which the limit is to

be fixed, it is certain to be inconsistently applied by different judges, the safer and more satisfactory rule is for the judge to admit whatever is relevant, and leave the question of its weight to the jury,—the rule adopted in some courts, as we have just seen. And so far as the judge deals with the question of its weight, he interferes with the just prerogative of the jury. ‘Whether there be any evidence,’ said *Mr. Justice* Buller, long ago, in *Carpenters’ Co. v. Hayward*, 1 Dougl. 375, ‘is a question for the judge; whether sufficient evidence, is for the jury.’ *Chandler v. Von Roeder*, 65 U. S. 24 How. 224, 16 L. ed. 633. This exercise of discretion is defended on the ground that the time of the courts ought not to be consumed in the taking of substantially immaterial evidence. But it will take more to hear the evidence, if relevant, without regard to its weight, than to decide, on exceptions, the question whether the evidence was admissible or inadmissible, on account of its degree of relevancy. Besides, it is hardly probable that respectable counsel will waste their own and their client’s time and money, and vex the court and jury, with much evidence which is so remotely relevant as to be practically immaterial. If the counsel are right in the production of relevant evidence, they ought not to be deprived of it because they may have misjudged as to its weight. In the first instance, the jury only have the right to say they have misjudged. Relevancy should be the simple and only test, where the statute does not control; and the exclusion of relevant evidence, offered in good faith, is as indefensible upon principle as would be the exclusion of a competent witness,—an accomplice, or one who had deliberately sworn falsely in a material matter, for instance,—on the ground that his evidence was without weight. 1 Greenl. Ev. § 49, and *note; Holt v. Crume*, Litt. Sel. Cas. (Ky.) 500.”

**i. Of Mr. Justice Davis.**—In summarizing the juridical view of this important topic, no language can be employed more apt and expressive than that of *Mr. Justice* Davis in a leading case decided by the United States Supreme Court:

“All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and

habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the first day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev. § 54. Bowie was not charged with fraud, nor with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of the truth. When trying a prisoner on an indictment for a particular crime, proof that he has a general disposition to commit the crime is never permitted. Phil. Ev. 143; *State v. Field*, 14 Me. 249. If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the general evidence to go to the jury, that when drunk he always stole a horse? And yet, the general rules of evidence are the same in civil as in criminal cases. ‘There is no difference,’ says Abbott, *J.*, ‘as to rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what rejected in the one ought to be rejected in the other.’ *Rex v. Watson*, 2 Stark. 155; *Reg. v. Murphy*, 8 Car. & P. 306.” *Thompson v. Bowie*, 71 U. S. 4 Wall. 463, 18 L. ed. 423.

It is within the discretion of the trial court to receive or reject testimony apparently irrelevant, on the assurance of counsel that evidentiary matter will be produced appropriately connecting the proposed evidence with issuable matter; and the exercise of this discretion is not the subject of review. *Abney v. Kingsland*, 10 Ala. 355; *Harris v. Holmes*, 30 Vt. 352; *Weidler v. Farmers Bank*, 11 Serg. & R. 134.

The principle is, that a proposal to introduce an isolated circumstance must contain in itself or by reference to something else, either already in evidence or which is offered as yet to come, enough to evince the manner in which it is to be legitimately operative, or it may be rejected. The important branch of *nisi*

*prius* practice, resting on this principle, is sustained by many authorities; but I think it will be found best explained and exemplified by the late case of *Weidler v. Farmers Bank*, 11 Serg. & R. 134, 139, 140. See also, in connection with this case, 4 Stark. Ev. 381, and *Winlock v. Hardy*, 4 Litt. 272, 273; *Harris v. Paynes*, 5 Litt. 105, 107, 108; *Wilson v. Bowen*, 5 T. B. Mon. 33; *Clark v. Beach*, 6 Conn. 142; *Rowt v. Kile*, 1 Leigh, 216, 223, 224; *People v. Genung*, 11 Wend. 18, 21, per Sutherland, J.; *Rex v. Fursey*, 6 Car. & P. 81. These cases contain some very apt illustrations; and the practice was also very well examined in a still later case, that of *Davis v. Culvert*, 5 Gill & J. 269, 304, and also in *Harwood v. Ramsey*, 15 Serg. & R. 31, 35. The result seems to be that the court may reject on the ground of the apparent irrelevancy, or may let in the proof in the first instance, and repudiate it if, after all is heard, it shall come short of any tendency to prove the issue.

**j. When Irrelevant Testimony Cannot be Excluded.**—Testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability of the fact in controversy. *Trull v. True*, 33 Me. 367.

As applied to testimony, it is that which directly touches upon the issue made by the pleadings, so as to “assist” in getting at the truth of it. *Hagerty v. Andrews*, 94 N. Y. 195.

In determining whether evidence is relevant, all the issues must be kept in view, as it may be admissible as to one though not as to another. *Folger, J.*, in *Platner v. Platner*, 78 N. Y. 95.

The following authorities sustain the averments of the text: *Hovey v. Grant*, 52 N. H. 569; *Green v. Gilbert*, 60 N. H. 146; *Bedell v. Foss*, 50 Vt. 94; *Luce v. Hoisington*, 56 Vt. 436; *Raynes v. Bennett*, 114 Mass. 424; *Fitzgerald v. Pendergast*, 114 Mass. 368; *Martin v. Tobin*, 123 Mass. 85; *Brierly v. Davol Mills*, 128 Mass. 291; Whart. Crim. Ev. § 24; *Rex v. Pearce*, Peake, 75; *Rex v. Egerton*, Russ. & R. 375, cited by Holroyd, J., in *Rex v. Ellis*, 6 Barn. & C. 148; *Furneaux v. Hutchins*, 2 Cowp. 807; *Doe v. Sisson*, 12 East, 62; *Butler v. Watkins*, 80 U. S. 13 Wall. 457, 20 L. ed. 629; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 319; *Eaton v. New England Teleg. Co.* 68 Me. 63; *Segar v. Lufkin*, 77 Me. 142; *Wiggin v. Scammon*, 27 N. H. 360; *Hill v. Crompton*, 119 Mass. 376; *People v. Horton*, 64 N. Y. 610; *Read v. Decker*, 67 N. Y. 182; *Pratt v. Richards Jewelry Co.*

69 Pa. 53; *Arnold v. Macungie Sav. Bank*, 71 Pa. 287; *Brooke v. Winters*, 39 Md. 505; *Tompkins v. Starr*, 41 Ohio St. 305; *Comstock v. Smith*, 20 Mich. 338; *Welch v. Ware*, 32 Mich. 77; *Willoughby v. Dewey*, 54 Ill. 266; *Hough v. Cook*, 69 Ill. 581; *Hall v. Stanley*, 86 Ind. 219; *Ogle v. Brooks*, 87 Ind. 600; *Hancock v. Wilson*, 39 Iowa, 47; *Mann v. Sioux City & P. R. Co.* 46 Iowa, 637; *Johnson v. Filkinton*, 39 Wis. 62; *Blakely v. Frazier*, 20 S. C. 144; *Baker v. Lyman*, 53 Ga. 339; *Selma, R. & D. R. Co. v. Keith*, 53 Ga. 178; *Ashley v. Martin*, 50 Ala. 537; *Shealy v. Edwards*, 75 Ala. 411; *Ferguson v. Thatcher*, 79 Mo. 511.

### § 253. Separate Functions of the Judge and Jury.

**a. Duty of the Court.**—As we have previously seen, it is the duty of the court to determine the competency of evidence, and to decide all legal evidence that arises in the progress of a trial, and consequently when, assuming that all the testimony adduced by the one or the other party is true, it does or does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence, is a question for the judge; whether there be sufficient evidence is for the jury. *Carpenters Co. v. Hayward*, 1 Dougl. 385; *Jewell v. Parr*, 13 C. B. 909; *Chandler v. Von Roeder*, 65 U. S. 24 How. 224, 16 L. ed. 633. Here again the question of relevancy is brought prominently into view, as a casual analysis of *Judge Campbell's* decision as above quoted will abundantly disclose.

If the plaintiff, in support of the issue developed by his complaint, has utterly failed to sustain his cause of action, and on resting his case has not made out even *prima facie* proof, is it not an obvious and ruthless corollary that any evidence, however pertinent, under more trying aspects of the case, that the defendant may produce, is utterly irrelevant? The complainant must submit to a non-suit, and this proposition, which must meet with universal assent, has its correlative equally obvious and logical.

**b. When Court may Direct Verdict.**—If, at the close of the cause, a *prima facie* case be established on the part of the plaintiff, and it is undisputed by the defendant, it has always been usual to direct a verdict for the plaintiff. *Crawford v. Wilson*, 4 Barb. 504-518; *Rich v. Rich*, 16 Wend. 676. This rests upon the same principle as the power to non-suit, that the court is the judge of the law when there is no dispute about the facts. Verdicts to an immense amount are daily taken under the direction of the pre-

siding judge, in cases where the defense has wholly failed. The jury assent to the direction by giving their verdict. The fact thus found is as conclusive upon the parties as if it had been a long deliberation. Nor is there anything in this practice that impairs the rights of the jurors, or the efficiency of trial by jury. It does not conflict with the maxim: *ad questionem facti, non respondent iudices; ad questionem legis, non respondent juratores*. Co. Litt. 295, *b*.

To bring a case in hostility to the maxim, it must be shown that a controverted question of fact was decided by the judge without the intervention of the jury.

**c. Law is for the Court, Fact for the Jury.**—In the case of the *People v. Croswell*, 3 Johns. Cas. 337, the rights of jurors were most elaborately discussed. In his 13th proposition (p. 362) General Hamilton remarks, “that in the general distribution of powers in any system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury. That as often as they are not blended, the power of the court is absolute and exclusive. That in civil cases it is always so, and may be rightfully so exerted;” and it was expressly asserted by Kent, *J.*, in delivering his opinion in the same case (p. 376). “The opinion of the judges in criminal cases,” he observes, “will generally receive its due weight and effect, and in civil cases it can and always ought to be ultimately enforced by the power of setting aside the verdict.” These principles are quoted with approbation by the New York Supreme Court in *Snyder v. Andrews*, 6 Barb. 48, and have been approved in many other cases.

With the weight of evidence the judge cannot concern himself except in certain cases, where the testimony comes from tainted sources, as in the case of accomplices and false witnesses, where he may caution but not exclude. *Underwood v. McVeigh*, 23 Gratt. 409; *Paulette v. Brown*, 40 Mo. 52; *Callanan v. Shaw*, 24 Iowa, 441; *Mead v. McGraw*, 19 Ohio St. 55; *Blanchard v. Pratt*, 37 Ill. 243. In *United States v. Anthony*, 11 Blatchf. 200, *Mr. Justice Hunt* directed the jury, upon the evidence, to return a verdict of guilty, every fact in the case being undisputed—a direction the propriety of which is by no means conceded. See 10 Alb. L. J. 33, 78; 2 Green, Crim. L. Rep. 226 *n*. See also Greenl. Ev. § 49, *a*.

**d. Pertinent Hypothesis Defined.**—Wharton says: Rele-

vancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue. If the hypothesis set up for the defense is forgery, then all facts which are conditions of forgery are relevant, hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable. Nor is it necessary at once to offer all the circumstances necessary to prove such proposition. The party seeking to prove or disprove the proposition may proceed step by step, offering link by link. Whatever is a condition either of the existence or the non-existence of a relevant hypothesis may be thus shown, but no circumstance is relevant which does not make more or less probable the proposition at issue. What has been said applies to all lines of investigation of truth. There is no controverted question in history, for instance, for whose solution it is not necessary to resort to the application of testing hypotheses, determining the probability of each hypothesis by the facts introduced by its support.

A similar series of progressive tests is applied in order to test the meaning of any controverted writing. A memorandum, for instance, in a foreign language, is put in evidence for the purpose of proving a debt. The plaintiff sets up, first, that the instrument is, we may say in German; secondly, that certain phrases in it have, by custom of trade, a meaning different from that which they bear in ordinary use. Here are two hypotheses successively presented in order to get at the meaning of the instrument; and whatever goes to prove these hypotheses is relevant. The number of the hypotheses increases with the complication of the case. Wharton, Ev. §§ 20-23.

f. **Recent Adjudications.**—In so far as we have given proper attention we fail to discern the least tendency to relax the well-settled principles that have heretofore distinguished the relevancy of evidence, or the rules governing its reception. Recent adjudications fully confirm the averments of the text, and generally support the propositions I have sought to establish. As illustrative of this truth, and as an additional guide to the authorities on this subject, the following decisions are appended :

Two facts are said to be relevant to each other when so related that, according to the common course of events, one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the



other. *Cole v. Boardman*, 2 New Eng. Rep. 716, 63 N. H. 580, authorities cited.

To be relevant the evidence need not prove the case, but should tend to prove it. *Chicago v. Dalle*, 2 West. Rep. 901, 115 Ill. 386.

It is sufficient if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove. *Louisville, N. A. & C. R. Co. v. Thompson*, 6 West. Rep. 555, 107 Ind. 442, authorities cited.

. Any facts tending to prove the main facts, and contemporaneous with it, are admissible as a general rule. *People v. Foley*, 7 West. Rep. 347, 64 Mich. 149, authorities cited.

Competency and admissibility of evidence are for the court; but its sufficiency and effect belong exclusively to the jury. *American Ins. Co. v. Smith*, 2 West. Rep. 150, 19 Mo. App. 627, authorities cited.

Evidence of facts upon which any reasonable inference or presumption can be founded, as to the truth or falsity of an issue or of a disputed fact, is admissible in evidence. *Aiken v. Kenison*, 2 New Eng. Rep. 797, 58 Vt. 665, authorities cited.

All questions calculated to elicit answers throwing any light on the issues involved are admissible, though relating to collateral transactions. *Manly v. Howlett*, 55 Cal. 94.

§ 254. **The Doctrine of Scienter.**—A man may do many acts which are justifiable or not, as he is ignorant of certain facts. He may pass a counterfeit coin, when he is ignorant of its being counterfeit, and is guilty of no offense; but if he knew the coin to be counterfeit, which is called the *scienter*, he is guilty of passing counterfeit money. Bouvier, Law Dict. title "*Scienter*."

It follows that the evidence must disclose knowledge on the part of the defendant or person accused which is necessary to charge upon him the consequences of the crime of tort. *Ibid*.

The possession of other counterfeit paper by the accused at the time of passing a counterfeit note is evidence of the *scienter* *United States v. Mitchell*, Baldw. 366.

It is necessary to allege and prove a *scienter* where there is injury by a domestic animal of mischievous propensity. *Mareau v. Vanatta*, 88 Ill. 133.

### § 255. Evidence Tending to Support an Issue.

a. **When Excluded in Rebuttal.**—The admission of evidence

which was irrelevant, but which was not objected to, will not authorize the admission in rebuttal of other irrelevant evidence which is objected to. *Stringer v. Young*, 28 U. S. 3 Pet. 320, 7 L. ed. 693.

Evidence which tends to support or has direct effect upon any issue is admissible. *Wade v. Leroy*, 61 U. S. 20 How. 34, 15 L. ed. 813.

If the evidence offered conduces in any degree to establish the fact in controversy, it should go to the jury. *Republic F. Ins. Co. v. Weide* ("Insurance Companies v. Weide") 81 U. S. 14 Wall. 375, 20 L. ed. 894.

**b. Proof Must Correspond with Allegations of Complaint.**—Proofs must correspond with the allegations in the declaration, but it is sufficient if the substance of the declaration is proved. No variance ought ever to be regarded as material where the allegation and proof substantially correspond; or where the variance was not of a character which could have misled the defendants at the trial. *Nash v. Towne*, 72 U. S. 5 Wall. 689, 18 L. ed. 527.

**c. Authorities from United States Supreme Court.**—A plaintiff cannot give evidence that a variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration. *Sheehy v. Mandeville*, 11 U. S. 7 Cranch, 208, 3 L. ed. 317.

Evidence to show the facts on which the claim is based cannot be regarded, where there is no averment in the bill to which it can be applied. *Cucullu v. Hernandez*, 103 U. S. 105, 26 L. ed. 322.

On the plea of *nul tiel record* of a judgment of the Circuit Court for the District of Wisconsin, a judgment of the Circuit Court for the Eastern District of Wisconsin is not evidence of such a judgment. *Dow v. Humbert*, 91 U. S. 294, 23 L. ed. 368.

Where the complainant alleged a contract for delivery of iron at one place, and the answer a contract for delivery at a different place, evidence offered by the plaintiff which tended to support the averment of the answer was properly admitted under Wis. Rev. Stat., § 2669, defendants having failed at the trial to prove that they were misled by the variance between the complaint and the proof. *Pope v. Allis*, 115 U. S. 363, 29 L. ed. 393.

Evidence of a partnership interest will not support an averment

of an individual interest, or *vice versa*. *Graves v. Boston Marine Ins. Co.* 6 U. S. 2 Cranch, 419, 2 L. ed. 324.

Allegations in a pleading of time, quantity, value, etc., need not be proved with precision. *United States v. Le Baron*, 71 U. S. 4 Wall. 642, 18 L. ed. 309.

There is no variance between proof of acceptance and payment of a draft, and the allegation of payment of money. *Nash v. Towne*, 72 U. S. 5 Wall. 689, 18 L. ed. 527.

Where defendants were sued for a joint liability evidence not tending to establish a joint liability was properly excluded. *Tilley v. Chicago* ("*Tilley v. County of Cook*") 103 U. S. 155, 26 L. ed. 374.

In trespass to real property, a mere possessory right in the defendant may be given in evidence under the general issue. *Cooley v. O'Connor*, 79 U. S. 12 Wall. 391, 20 L. ed. 446.

Evidence of the state of the art is admissible in patent cases, in actions at law, under the general issue, and in equity cases without averment. *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Vance v. Campbell*, 66 U. S. 1 Black, 427, 17 L. ed. 168.

In an action for infringement of a patent, evidence by defendant as to the novelty, utility and *modus operandi* of the alleged invention of the plaintiff is competent. *Klein v. Russell*, 86 U. S. 19 Wall. 433, 22 L. ed. 116.

Under a general denial of a patentee's priority of invention, evidence of prior knowledge and use, taken without objection, is competent at the final hearing on the question of the validity of the patent. *Zane v. Soffe*, 110 U. S. 200, 28 L. ed. 119.

A receipt after the suit was brought may be given in evidence to reduce the amount of recovery. *Burdell v. Denig*, 92 U. S. 716, 23 L. ed. 764.

Any circumstances otherwise competent in evidence to reduce the damages, may be proved on the trial for that purpose, although it may not have come into existence until after the commencement of the action. *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1139.

In every action for malicious prosecution, it must be proved that the proceedings instituted against the plaintiff have failed; but their failure is not evidence either of malice or want of probable cause. *Stewart v. Sonneborn*, 98 U. S. 187, 25 L. ed. 116.

Usage cannot alter the law, but it is evidence of the construction

given to it, and must be considered binding on past transactions.

*United States v. Macdaniel*, 32 U. S. 7 Pet. 1, 8 L. ed. 587.

No usage or custom can be proved among bankers and brokers dealing in negotiable paper, in contravention of the rule of commercial law that a purchaser who takes it after maturity takes it subject to the rights of antecedent holders. *Vermilye v. Adams Exp. Co.* 88 U. S. 21 Wall. 138, 22 L. ed. 609.

Where there is no evidence whatever that a written contract was a gambling contract on the prices of produce, evidence of what other people intended by other contracts of a similar character, however numerous, is not competent to prove the contract to be of that character; and if there is no evidence on the subject, the court may refuse to charge the jury to find upon that question. *Rountree v. Smith*, 108 U. S. 269, 27 L. ed. 722.

### § 256. *Res Inter Alios Acta.*

a. **Analysis by Best and Sir James Stephen.**—This celebrated maxim in its entirety is "*Res inter alios acta alteri nocere non debet*," "*Res inter alios actæ alteri nocere non debent*." And in practical application it more particularly assimilates with the principles of criminal law. Its prominence, in the law of evidence, is largely attributable not to the idea embodied in its literal translation, but rather to the implications, inferences and postulates the law has woven around it. That no person is to be affected by the words or acts of others, unless he is connected with them either personally or by those whom he represents, or by whom he is represented,—is a proposition that finds very sturdy support in all our instincts of common justice. It should be added that to the above forms of the maxim, some books add, "*Sed quandoque prodesse potest*," or "*sed prodesse possunt*," and in some it runs "*Nec nocere nec prodesse possunt*." These additions are, however, unnecessary, for the rule is only of general, not universal application, there being several exceptions both ways. Neither does the expression "*inter alios*" mean that the act must be the act of more than one person; it being also a maxim of law, "*Factum unius alteri nocere non debet*."

Following out the great principle which exacts the best evidence, it is obvious that things done *inter alios* or *ab alio* are even more objectionable than derivative or second-hand evidence. The two are indeed sometimes confounded, but there is this distinction between them, that derivative or second-hand evidence indicates

directly a source of legitimate evidence, while *res inter alios acta* either indicates no such source, or at most does so indirectly. Suppose for instance, that on an indictment for larceny A were to depose that he heard B (a person not present) say that he saw the accused take and carry away the property; this evidence is objectionable as being offered *obstetricante manu*, but it indicates a better source, namely B. Suppose, however, that C were to depose that he overheard two persons unknown forming a plan to commit the theft in question, in which they spoke of the accused as an accomplice who would assist them in its execution; this evidence is but *res inter alios acta*, for it shows no better source of legal proof, although as indicative evidence, and thus putting officers of justice, etc., on a track, it certainly might not be without its use.

There is likewise this point of resemblance, between second-hand evidence and *res inter alios acta*, that the latter, like the former, must not be understood as excluding proof of *res gestæ*. The true meaning of the rule under consideration is simply this, that a party must not be affected by what is done behind his back. Best, Ev. §§ 507, 508.

“The application of the maxim to the law of evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it . . . which show that it means, you are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

“In its liberal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

\* \* \* \* \*

“It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English law of evidence, for this is the rule which prevents a man charged with a particular offense from having either to sub-

mit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular occasion. A statement of the law of evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one would neither represent the existing law fairly nor in my judgment improve it.

"The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime."

I am indebted to the foregoing exposition of the rule to Mr. Stephen, who embodies the suggestions outlined, in note 6 of his Digest. Commenting upon the rule, Mr. Chamberlayne, in his scholarly annotation of Best's Principles of the Law of Evidence, § 506, *note c* says:

**b. Modern Relaxation of the Rule.**—As the rule hinted at, rather than stated, in the phrase "*res inter alios acta*" is in its nature exclusionary, it may be assumed that the evidence it was designed to exclude is both logically and legally relevant. (Conf. § 251, *n. 1, supra*). The grounds of the rule, therefore, are entirely practical, viz.: (1) To prevent multiplicity of collateral issues, confusing to the jury and acting as a surprise upon the parties; (2) To provide that a man shall not be convicted of one crime by evidence that he has committed another. *Hubbard v. Androscoggin & K. R. Co.* 39 Me. 506. This being the case, there may be said to exist in the United States a strong tendency to limit the rule in civil causes. This relaxation appears most commonly in the numerous cases where the necessary proof of liability consists in strengthening a possible into a probable cause by elimination of all complicating circumstances; in other words, by establishing the desired relation of cause and effect through the inductive process of tracing the same effect through a variety of instances where the cause for which legal liability is claimed is the only constant force, *e. g.*

It being in dispute whether a horse was or was not frightened by a certain pile of lumber, evidences that other horses were frightened by the same pile, under a variety of circumstances, is admissible. *Darling v. Westmorland*, 52 N. H. 401.

The question being whether a certain railroad company negli-

gently permitted its cars to run off the track, evidence that the company's cars have frequently run off the same track. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

The question whether a certain fire was caused by sparks from a certain locomotive, evidence is admisssble that both before and after such fire, at various times during the same summer, other fires have been caused or rendered possible by sparks from other engines of the same company. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Field v. New York Cent. R. Co.* 32 N. Y. 339; *Longabaugh v. Virginia & T. R. Co.* 9 Nev. 271; *Boyce v. Cheshire R. Co.* 43 N. H. 627; *Cleveland v. Grand Trunk R. Co.* 42 Vt. 449; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Conf. Smith v. Old Colony & N. R. Co.* 10 R. I. 22. But see, *contra*, *Coale v. Hannibal & St. J. R. Co.* 60 Mo. 227; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242-254; *Boyce v. Cheshire R. Co.* 42 N. H. 97. The last two cases may, however, be considered as substantially overruled. 2 Cent. L. J. 642.

**c. Subdivision of the Rule.**—The maxim naturally bisects itself to form an important subject as will hereafter appear under the title of "*Res adjudicata*." In its modified form we find it in the Roman law expressed as *res inter alios judicata alteri nocere non debet*. Applying that great principle of both mediæval and modern law which imperatively calls for the best evidence, it is apparent that things done *inter alios* or *ab alio* infringe the rules of evidence and contravene its most salutary laws in a far greater degree than even the most relaxed principles of secondary evidence would permit. There are, it is true, certain characteristics and affinities between both grades of the evidence last mentioned, and there is a constant tendency in flimsy minds to commingle the elements entering into the formation of each.

**d. Recent Application of the Rule.**—The New York Court of Appeals in a very recent case indulged in a practical application of the rule and unanimously affirmed the judgment sought to be reversed on the ground that as the title offered to the plaintiffs came to the defendant through the will of Gideon Tucker, and under proceedings in partition instituted by Geo. W. Tucker, as trustee, but to which certain persons entitled to the property in remainder were not made parties—that as they were not allowed their day in court, and were not made parties to the

action, they were not concluded by the judgment; that one claiming under a deed given, on sale under said judgment, could not give a title so freed from reasonable doubt as to oblige the vendee to accept it. His Honor held, that as to the beneficiaries ultimately entitled to the remainder, the principle contained in the maxim *res inter alios acta alteri nocere non debet* applied, and that the court below properly held that they could not be concluded by the partition judgment. *Moore v. Appleby*, 10 Cent. Rep. 697, 108 N. Y. 237.

A further illustration of the principle under review arises when it is sought to show that a person did a particular thing. No grade of stupidity would for an instant contend that evidence was admissible of the fact that the same person had done a similar thing at some other time. *Vason v. Beall*, 58 Ga. 500. Hence, in an action for assault with intent to ravish it is inadmissible for the plaintiff to prove that the defendant had made similar attempts on other women, or for the defendant to prove that the plaintiff had made similar charges against other men. *Ogle v. Brooks*, 87 Ind. 600.

So the fact that a party draws his notes generally in a particular way is not evidence to prove that he drew a specific note in such a way. *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

e. **An Exposition by Peckham, J.**—*Judge Peckham* in a very recent case has given an apt and instructive statement of the rule in the following language:

“The materiality of the evidence as against anyone, is not apparent, but a conclusive answer to its admissibility as against Auguste Schattman is that the reports were ‘*res inter alios acta*.’ They were the acts of the bookkeeper of Schattman Brothers, of New York, and if it be assumed that he was their agent or representative, yet the Schattman Brothers were not parties to this action, and neither their acts nor declarations were evidence against Auguste Schattman. If it be said that the complaint alleged a general conspiracy to defraud, and that Auguste Schattman was a party to it, and that the acts or declarations of a conspirator performed or made during the progress of the conspiracy and in aid thereof are evidence against all, the answer is that *prima facie* evidence ought first to be given of the existence of a conspiracy, before such acts or declarations are evidence against any but the party making them; and that there is no evi-



dence whatever of the existence of any such conspiracy so far, at any rate, as Auguste Schattman is concerned. I do not think that the evidence was material in the first place, and if so, it was not admissible as against Auguste Schattman, and it was offered generally and against all." *Rutherford v. Schattman*, 119 N. Y. 604.

§ 257. **Evidence Excluded on Ground of Indecency.**—The delicate sensibilities of early text-writers have evolved a non-sensical theory much quoted by unreflecting judges, and never acted upon by any man of sense. The gist of this theory is that there are species or grades of evidence too indecent or too unwholesome for public expression or portraiture; that the rare exotic known as "public virtue" will receive irreparable injury by contact with some unpleasant testimony the emergencies of a trial make it necessary to produce. While it is among the regrets we never expect to outlive that the witness stand is not purged from all form of indecency, it is submitted that while the law of evidence is dependent upon such instrumentality as frail human nature can disclose, for most of its beneficent effects, it is a brainless exhibit of whimsical prudery to count evidence indecent that has for its object the exposure of a crime or the vindication of a right. See *Da Costa v. Jones*, Cowp. 729; *Melvin v. Melvin*, 58 N. H. 569.

The position taken by Professor Greenleaf on this subject is utterly indefensible, and this condemnation is judicially expressed by Sir James Stephen when he says: "I know of no case in which a fact in issue or relevant to an issue, which the court is bound to try, can be excluded merely because it would pain some one who is a stranger to the action." Stephen, Dig. (Chase's ed.) art. 2, note 2.

### § 258. Counsel's Offer to make Certain Proof.

a. **Method Sanctioned by Usage.**—It frequently occurs in the progress of a trial that certain evidence is offered to the introduction of which the objection of irrelevancy is interposed, and it as frequently happens that counsel states to the presiding judge the purpose for which the evidence is offered, and follows up such statement by a disclosure of how the evidence may be material. This method has the sanction of usage, and may be regarded as a well recognized formula for obtaining a hearing

upon subject matter that is *prima facie*, perhaps, objectionable. *McGrath v. Bell*, 42 How. Pr. 182.

Very accurate exposition of this subject is found in the opinion of Judge Cowen in *Van Buren v. Wells*, 19 Wend. 204.

Evidence which is apparently irrelevant may be shown to be relevant by either referring to matters already proved in the cause, or by a statement of some additional evidence which is offered to be given in connection with the proposed fact. It is always proper to ascertain as certainly as possible that the evidence offered is relevant and material before it is received. But there are times when it is not advisable to apprise the witness about to be examined of the facts expected to be proved by him; or the counsel himself may not be sufficiently advised as to the facts; these or any other sufficient reasons are to be weighed by the justice upon such questions. But in every case, counsel are bound, if required, to inform the court how the evidence is relevant so that he may act understandingly in relation to the admission of the evidence. This may be done by making the statement in writing and handing it to the court. 3 Wait, L. & Pr. (5th ed.) 474.

**b. Offer Must be Specific.**—Offer must be so full and specific that its exclusion would be erroneous in any point of view. *Hogaboom v. Ehrhardt*, 58 Cal. 231; *Easton v. O'Reilly*, 63 Cal. 309.

Offer of evidence improperly rejected is ground of reversal, though ability to make the proof may be highly improbable if not manifestly impossible (*People v. Blake*, 65 Cal. 279), and it must be remembered that the admission of irrelevant evidence may have no effect whatever when the cause is tried by the court, but may become highly prejudicial when it is tried before a jury. *Heffernan v. Supreme Council A. L. of H.* 40 Mo. App. 605.

**c. No Doubt Must Exist as to Competency and Materiality.**—All systems of practice seem to concur in stating the general rule that an offer of evidence must be made in such terms as to leave no room for doubt as to its competency and materiality under a proper definition of the law applicable thereto, and if not so made, a general exception to its conclusion will not be available unless it appears plainly that the court understood the ground which in law might have justified its reception.

**d. The Practice in New York.**—A party against whom a witness is called and examined, knowing the witness to be incom-

petent, cannot lie by and speculate on the chances, first learn what the witness testifies, and then when he finds the testimony unsatisfactory, either object to the competency of the witness or to the form or substance of the testimony and have it stricken out. *Quin v. Lloyd*, 41 N. Y. 349; *People v. Sanders*, 3 Hun, 16-19. See *Pitney v. Glens Falls Ins. Co.* 61 Barb. 335; *Mercer v. Vose*, 8 Jones & S. 218. Such a case differs materially from one where the evidence was apparently competent when given, but was discovered to be incompetent upon cross-examination or at a subsequent stage of the trial.

But an omission to object to testimony when it is offered is not such a concession of its competency as to absolutely preclude the party against whom it has been given from subsequently insisting that it should be withdrawn from the consideration of the party. *Hamilton v. New York Cent. R. Co.* 51 N. Y. 100. If an objection to competent evidence is not taken when the evidence is offered, and the omission is shown to have been made from mistake or inadvertence, the trial court may permit the party, at any time before the close of the trial, to move to strike it out. *Miller v. Montgomery*, 78 N. Y. 282-286. This is not an uncommon practice in the trial of cases. But the exclusion of the evidence at a subsequent stage of the trial is wholly in the sound discretion of the trial judge, and will be exercised where it is just that the incompetent evidence should be excluded, and no harm can come to the other party from the delay in making the objection. *Ibid.* If, however, the objectionable character of the evidence was as apparent when the evidence was offered, as when it was in, the party failing to object takes the risk of the refusal of the court to exclude it. *Pontius v. People*, 82 N. Y. 339-347. See *Quin v. Lloyd*, 41 N. Y. 349. A court of review will not interfere with the fair exercise of the discretion of the trial court in this particular. *Miller v. Montgomery*, 78 N. Y. 282. But an improper exercise of such discretion is a ground for reversal. *Quin v. Lloyd, supra.*

The practice methods of the New York courts in reference to striking out and disregarding evidence, are carefully indicated in Baylies, Trial Practice, 205.

**e. The California Rule.**—The courts of this State make no departure from the rule we have previously outlined. They decide in effect that the offer of evidence must include an offer to

prove all facts necessary to make it relevant, and that an offer to prove certain facts will be construed as an offer to prove them in their proper order. Further, these courts insist that evidence offered for a particular purpose must be restricted to the purpose announced, and that the offer of relevant testimony need not embrace the whole defense.

When offer is of a mass of evidence complex in character it is error to exclude the whole, if any part is admissible. *Board of Education v. Keenan*, 55 Cal. 642. Offer must be so specific and full that its exclusion would be erroneous in any point of view. *Hogaboom v. Ehrhardt*, 58 Cal. 231; *Easton v. O'Reilly*, 63 Cal. 309.

Offer of evidence improperly rejected is ground for reversal, though ability to make the proof may be highly improbable if not manifestly impossible. *People v. Blake*, 65 Cal. 279.

For the authorities sustaining the propositions herein announced, see:

Offer of relevant testimony need not embrace the whole defense. *Vilhac v. Biven*, 28 Cal. 409; *Easton v. O'Reilly*, 63 Cal. 309.

Evidence offered for a particular purpose will be restricted to purpose announced. *Richardson v. McNulty*, 24 Cal. 339; *Roff v. Duane*, 27 Cal. 565; *Henry v. Everts*, 29 Cal. 610; *Macdougall v. Maguire*, 35 Cal. 274.

Offer to prove certain facts will be construed as an offer to prove them in their proper order. *Lick v. Diaz*, 37 Cal. 438.

Offer of evidence must be offer to prove all facts necessary to make it relevant. *Chamberlain v. Vance*, 51 Cal. 75; *Hogaboom v. Ehrhardt*, 58 Cal. 231; *Easton v. O'Reilly*, 63 Cal. 309.

When offer is of a mass of evidence complex in character it is error to exclude the whole if any part is admissible. *Board of Education v. Keenan*, 55 Cal. 642.

**f. Views of Judge Rumsey.**—*Judge Rumsey's* recent work on Code Practice (1888) contains an admirable summary regarding the relevancy of evidence in connection with an offer to prove certain facts by ultimately showing the existence of others to which they refer. The exceptional qualifications of the distinguished jurist are fully recognized while the intimate relations the topic sustains to this branch of our subject abundantly justify an excerpt from chap. 31, art. 6 which we append:

"Not infrequently in the trial of a case, it happens that the relevancy of a particular bit of evidence is not apparent; for the reason that the case has not sufficiently developed to show its materiality, or because some other fact which is necessary to make it material has not yet been established. Where that is the case, it is sometimes necessary for the counsel to make an offer of evidence, for the sake of getting a ruling to which an exception can be taken. An offer of evidence is intended solely to inform the court of what the party making the offer intends to prove, so that it will be enabled to rule intelligently on objections to questions which have been asked. It is not a substitute for testimony; and it is not good practice, except in very special cases, to decide a case upon an offer of evidence. Judges will rarely receive an offer of proof when it can be avoided (*Coulson v. Whiting*, 12 Daly, 408); nor will they require counsel to object to it; and experienced counsel are rarely willing to rest the case of their client on an objection and exception to an offer of proof. It is much better, if practicable, to receive the testimony which is offered to be given, subject to objection, with leave to the party taking the objection to move to strike it out. In such a case as that, there is no opportunity for a party offering the proof, to get a ruling upon an extensive offer to prove facts which do not exist, or which he has not the means of proving, if they do exist. But where to take the testimony would unnecessarily consume time, and the party makes an offer in good faith of only such facts as he really believes he is able to prove, a court may properly hear the offer and make a ruling based upon it. But wherever that is done, the offer is to be construed with great strictness; and it is not regarded with any favor. *Coulson v. Whiting*, *supra*. It is necessary that it should include everything that a party proposes to show upon the particular point, in addition to what already appears; or at least enough to make the materiality of the facts clearly apparent. *Pepin v. Lachenmeyer*, 45 N. Y. 27. If the relevancy of the facts offered does not clearly appear, the better practice is to sustain the objection to the offer; and it is not error to do so. *Van Buren v. Wells*, 19 Wend. 203. If the competency or materiality of the facts offered to be shown, depends upon the facts, they must also be stated, and the offer must also be made to prove them as well, or it is not error to sustain the objection. *Curnes v. Platt*, 4 Jones & S. 361. . . . If an offer contains matter not relevant, or not competent, an objection

to it must always be sustained. *Hosley v. Black*, 28 N. Y. 438. It rests with the party making the offer, that it shall be so clear that there is no doubt what is intended to be proved. If the meaning of it is doubtful, and the offer is excluded, the party making it cannot appeal, or insist on a meaning favorable to himself, unless it was very apparent that the offer was so understood. *Keller v. New York Cent. R. Co.* 2 Abb. App. Dec. 480; *McGrath v. Bell*, 1 Jones & S. 195." 2 Rumsey, Practice, 297.

**g. Suggestions of Chief Judge Folger.**—The following pertinent suggestion from an opinion of *Chief Judge Folger* will evoke its own suggestive commentary: "At the time the evidence was taken, the plaintiff professed to the court that he meant to connect it afterward with a reason and consideration for making all these notes. The court was not in error in taking this part of the evidence in this order. If the plaintiff failed to thus connect, the defendant, to save his point, should have moved to strike out the testimony before the close of the case." *Bayliss v. Cockcroft*, 81 N. Y. 363.

### § 259. Motion to Strike Out.

**a. When Motion will be Entertained.**—The courts are disposed in all instances to credit the statement of a reputable counsel that certain grades of evidence, although immaterial in themselves, are designed to lead into important testimony closely connected with the issues in the case, and fully designed to support the contentions of the parties litigant. It is the usual practice to allow the admission of such evidence. The court, however, is not bound to take that course; and if the evidence is objected to by the other side, the court may require the counsel offering the evidence to show how it will become material, by stating what other facts are proposed to be proved in connection with the offered evidence. If the party is required thus to show how the evidence is material, he will be bound to do so, or the evidence may be properly rejected. *Van Buren v. Wells*, 19 Wend. 203; *Roy v. Targee*, 7 Wend. 359; *First Baptist Church of Brooklyn v. Brooklyn F. Ins. Co.* 23 How. Pr. 448.

The court can never exclude relevant testimony, because it does not at once establish the issues to which it relates. The different links must be introduced in succession. The party against whom it is introduced is amply protected against any prejudice by his right to call upon the court to direct the jury to dis-

regard it for all purposes, where it is not *prima facie* evidence of any material issue. *Murphy v. Boker*, 28 How. Pr. 251. Where his counsel neglects to do, the court has a right to presume he does not think the evidence of sufficient importance to require such a caution. It is not ground of complaint that the court in such a case has not volunteered to warn the jury against being misled, or a reason to grant a new trial on the ground of an oversight. *Ibid.*

**b. Limitations of the Right.**—The decisions seem to limit the right to move to strike out evidence to those cases where it was impossible for the objecting party to make his objection before the evidence was admitted. The moving party must specify his objections with the like particularity as is required in pointing out an objection to a question. *Henry v. Southern Pac. R. Co.* 50 Cal. 176.

**c. Exercise of the Right.**—If illegal evidence has been received against objection, or upon a promise to render it competent, and the promise is not kept, the accused is entitled to have it struck out on motion. *Dillin v. People*, 8 Mich. 357; *Zell v. Com.* 94 Pa. 258. These cases hold that merely instructing the jury to disregard it does not cure the error. Compare *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708.

So also of the testimony of a witness for the prosecution, when the accused has had no opportunity to cross-examine. *People v. Cole*, 43 N. Y. 508.

The failure to object before an answer was made, if the grounds of objection were then apparent, precludes a subsequent motion to strike out the answer (*People v. Chacon*, 2 Cent. Rep. 910, 102 N. Y. 669); so holding even where the objection was that the witness was apparently proceeding to repeat an improper answer which had been already struck out. Counsel cannot lie by and speculate on the chances of first hearing what the witness will testify to, and then, when he finds the testimony unsatisfactory, move to strike it out. Abb. Trial Brief (Crim. Cases, p. 206).

**d. Waiver of the Right.**—As a general rule a party will be deemed to have waived an objection to incompetent evidence by a failure to object; the evidence is received and must be weighed for what it is worth. (*Miller v. Montgomery*, 78 N. Y. 282, 286.) It has, therefore, been held that where evidence, bearing upon the issues, has been duly taken upon the trial, without objection, and

has been received absolutely and unconditionally, the trial judge has no power to strike it out or exclude it from the consideration of the jury. (*Hall v. Earnest*, 36 Barb. 585, 591; *Lindsay v. People*, 67 Barb. 548, 5 Hun, 104; *Stephens v. People*, 4 Park. Crim. Rep. 396; *Filkins v. Baker*, 6 Lans. 516.)

**e. Answer out of Time, When Stricken out.**—The court has a right, and it is its duty, to give opposite counsel a chance to object to a question which has been answered too quickly, and to strike out the answer for such purpose; and where a witness answers a question too quickly to give an opportunity for an objection before the answer is given, and the court, upon motion, strikes out the answer, on grounds of objection to the question, and an exception is taken to each ruling, but no further objection is made to the question after such ruling, the question itself remains unchallenged, and the passing of the examining counsel to another question is a waiver of the former question, and his exception to the striking out of the answer is not well taken. *Barkly v. Copeland*, 86 Cal. 483.

§ 260. **Summary of Preceding Views.**—The English jurists are presumed to have early caught both the spirit and letter of the rule in vogue among us, as is clearly indicated by the following abstract from Stephen's Digest, art. 8:

**a. Position of English Courts.**—Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it, may be proved if they are necessary to understand it.

In criminal cases the conduct of the person against whom the offense is said to have been committed, and in particular the fact that he made a complaint soon after the offense to persons to whom he would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant.

When a person's conduct is in issue, statements made in his presence and hearing by which his conduct is likely to have been affected, are deemed to be relevant facts.

"The items of evidence included in this article are often referred to by the phrase *res gestæ*, which seems to have come into use on account of its convenient obscurity. The doctrine of *res gestæ* was much discussed in the case of *Wright v. Tatham*, 9 Scott, 79, *et seq.* In the course of argument, Bosanquet, *J.*, observed,



‘How do you translate *res gestæ*? *gestæ*, by whom?’ Parke, *B.*, afterward observed, ‘The acts by whomsoever done are *res gestæ*, if relevant to the matter in issue. But the question is, what are relevant?’ (7 Ad. & El. 353.) In delivering his opinion to the House of Lords, the same judge laid down the rule thus: “Where any facts are proper evidence upon an issue” (*i. e.* when they are in issue, or relevant to the issue) ‘all oral or written declarations which can explain such facts may be received in evidence.’ (8. C. 4 Bing. N. C. 548.) The question asked by *Baron Parke* goes to the root of the whole subject, and I have tried to answer it at length in the text, and to give it the prominence in the statement of the law which its importance deserves.” Stephen, Dig. art. 8, note 5,

**b. American Vindication of English Theory.**—The principle here outlined has received ample vindication from the American courts, and it is well settled that evidence of declarations made by a party insured, prior to the issuance of the policy, to various third parties, when speaking of an existing disease, is proper upon the question of the truthfulness of statements made by him to the examining physician. (*Kelsey v. Universal L. Ins. Co.* 35 Conn. 225; *Aveson v. Kinnaird*, 6 East, 188; *Swift v. Massachusetts Mut. L. Ins. Co.* 2 Thomp. & C. 308; *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123; *Wheelton v. Hardisty*, 8 El. & Bl. 255; *Merchants & M. Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Handy (Ohio) 408; *Sweet v. Fairlie*, 6 Car. & P. 1; *Higbie v. Guardian Mut. L. Ins. Co.* 53 N. Y. 603; *Matteson v. New York Cent. R. Co.* 35 N. Y. 487.)

**c. Implication with Principles Outlined in *Res Gestæ*.**—It is a rule that when an act is done, to which it is necessary or important to ascribe a motive or a cause, what was said by the actor at the time, from which the motive or cause may be collected, is part of the *res gestæ*, and may be given in evidence (*Ambrose v. Clendon*, Cas. t. Hardw. 267; *Bateman v. Bailey*, 5 T. R. 512; *Gilchrist v. Bale*, 8 Watts, 355, 358; *Barnes v. Allen*, 1 Keyes, 390; *Caughey v. Smith*, 47 N. Y. 244); and this is so sometimes when the actor is not a party to the suit, as well as sometimes when he is; when words go with an act the nature of which is the subject of inquiry, they are taken as original evidence, because what is said at the time is legitimate, if not the best evidence of what was passing in the mind of the actor (1

Phil. Ev. 185; and see *Thomas v. Connell*, 4 Mees. & W. 267, where declarations of a bankrupt were received to show knowledge by him of his insolvency, the fact of his bankruptcy being proven *aliunde*). So when one is lame, or weak, or otherwise in bad bodily plight, his statement as to the cause, character and degree thereof, made at the time of the physical exhibition of the infirmity, would seem to be a legitimate mode of reaching his knowledge of his own condition.

**d. Citation of Authority.**—Unless the case falls within some well recognized class of exceptions, an evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to the weight, and not to the admissibility of evidence. *Craven v. Central Pac. R. Co.* 72 Cal. 345.

Evidence tending to prove a material issue cannot be excluded. *Camp v. Camp*, 5 New Eng. Rep. 140, 59 Vt. 667.

Evidence pertinent to an issue should be admitted, however little it may prove. *Baltimore, O. & C. R. Co. v. Evarts*, 11 West. Rep. 875, 112 Ind. 533.

Unless excluded by some positive exceptions, everything relative to the issues is regarded as admissible, and this is extended to every hypothesis pertinent to the issue. Authorities cited in *Bell v. Brewster*, 9 West. Rep. 432, 44 Ohio St. 690.

It is error to admit evidence on a point not put in issue by the pleadings. *Moline Plough Co. v. Braden*, 71 Iowa, 141.

Evidence which, standing alone, is immaterial, should be excluded if no foundation for it is laid or promised to be laid. *Watson Coal & Min. Co. v. James*, 72 Iowa, 184.

## § 261. Facts Necessary to Explain or Introduce Relevant Facts.

**a. The English Statute on the Subject.**—Facts necessary to be known to explain or introduce a fact in issue or relevant or deemed to be relevant to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of any thing or person whose identity is in issue or is, or is deemed to be relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction,

or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively. Stephen, Dig. art. 9.

**b. Indorsed by New York Court of Appeals.**—As a pertinent illustration of the principle contended for in the foregoing paragraph approving reference is made to the recent case of *Pontius v. People*, 82 N. Y. 339. The opinion of Judge Danforth, voicing the sentiment of the entire appellate bench proceeds as follows: "It was relevant to inquire upon cross-examination as to this money, where it was procured by him, at what place kept, from whence taken to make the loan; and it was also relevant and pertinent to give in evidence any fact which would tend to show the improbability of his narrative. His conduct in regard to necessary expenses, his pecuniary necessities, the borrowing of money by himself at or about the time when he claimed to have advanced the complainant money, would all bear upon the question. So would the fact that small debts were contracted by him, and not paid when due, or after frequent request, indicate something in regard to his pecuniary ability, and might well be submitted to the consideration of the jury, with other circumstances. A man may, indeed, be willing to lend to his neighbor in time of need, and yet be unwilling to pay his debts in due season, although fully able to do both; but whether in any given case, either one or both of these facts existed would have to be determined from a variety of circumstances, and their force could properly be estimated by the jury. The inquiry, therefore, in regard to the undertaker's bill, and other debts contracted by the defendant, and not paid, and his omission to pay them after frequent request, was properly allowed. It was all part of a legitimate cross-examination to which the defendant offered himself, and in a measure demanded when as a witness he testified to the fact of a large loan of money."

**c. Criminal Features of the Rule.**—On a trial for a criminal offense other offenses of a similar character may be proved, if they tend to show the *quo animo* of the offense in question, although they may also tend to show the accused has committed another indictable crime. 1 Whart. Am. Crim. Law (6th ed.), § 649; *Rex v. Robert*, 1 Campb. 399; *Rex v. Ellis*, 6 Barn. & C. 145; *Rex v. Davis*, 6 Car. & P. 177; *Reg. v. Dossett*, 2 Car. &

K. 306; *Com. v. Choate*, 105 Mass. 459; *Bunn's Case*, 1 Mood. C. C. 146; *Bottomley v. United States*, 1 Story, 135; *State v. Williams*, 2 Rich. L. 418; *Wood v. United States*, 41 U. S. 16 Pet. 360, 10 L. ed. 994; *Reg. v. Richardson*, 8 Cox, C. C. 448; *Reg. v. Geering*, 18 L. J. M. C. 215; *Stout v. People*, 4 Park. Crim. Rep. 71; *People v. Wood*, 3 Park. Crim. Rep. 681; *Com. v. Ferrigan*, 44 Pa. 386; *Com. v. Coe*, 115 Mass. 481; *Com. v. Eastman*, 1 Cush. 189; *Com. v. Tuckerman*, 10 Gray, 179; *Copperman v. People*, 56 N. Y. 591; *Weyman v. People*, 4 Hun, 511. See also 1 Greenl. Ev. § 53 and notes.

**d. Relevancy of Occurrences Similar to but Unconnected with Facts in Issue.**—As will be seen by an examination of the cases above cited, and by a consideration of the principles which underlie them, it can make no difference whether the transaction sought to be proved, to throw light upon the main issue, occurred before or after the time of the alleged crime. They may be more significant in the one case than in the other, but in either case they reflect light upon the main transaction and are regarded as relevant.

**e. General Application of Foregoing Rules.**—These citations from authors of acknowledged repute have abundant support in decided cases, and are sufficient to show the general rules of evidence which we are called upon to consider. They have been applied to a large variety of cases. In the trial of a person charged with passing counterfeit money, proof is always received to show that the prisoner on other occasions, both before and after the time named in the indictment, passed other counterfeit bills. On the trial of a person charged with receiving stolen goods, it may be shown that before and after the time of the alleged crime he received other stolen goods from the same party; and the same kind of evidence has been received upon trials for embezzlement. *Rex v. Davis*, 6 Car. & P. 177; *Dunn's Case*, 1 Mood. C. C. 146; *Rex v. Balls*, 1 Mood. C. C. 470; *Reg. v. Richardson*, 8 Cox, C. C. 448; *Com. v. Price*, 10 Gray, 472; *Com. v. Ruckerman*, 10 Gray, 179; *Copperman v. People*, 56 N. Y. 591. And the same class of evidence has been received upon trials for obtaining property by false pretenses. *Reg. v. Francis*, 12 Cox, C. C. 612; *Com. v. Stone*, 4 Met. 43; *Com. v. Eastman*, 1 Cush. 189; *Com. v. Coe*, 115 Mass. 481; *Bielschowsky v. People*, 3 Hun, 40; aff'd, 60 N. Y. 616; *Weyman v. People*, 4 Hun, 511; aff'd, 62

N. Y. 623. In *Stone's Case*, Shaw, *Ch. J.*, speaking of this kind of evidence, said: "This is an exception to the general rule of evidence. But it must be considered that it is to prove a fact not provable by direct evidence; that is, a guilty knowledge and purpose of mind, which can rarely be proved by admissions or declarations and can in general be proved only by external acts and conduct. The case is strictly analogous to the rule in relation to the proof of *scienter* on a charge of passing counterfeit bills or coin."

In *Eastman's Case*, Dewey, *J.*, said: "Evidence of other purchases of goods than those charged in the indictment, made by the defendants from other persons during the month of March, 1844, under similar circumstances with the transactions charged in the indictment, was admissible for the purpose of showing the nature of the business of the defendants, and the extent of the purchases made by them, and also as bearing upon the bona fide character of the dealings of the defendants with the particular individuals alleged to be defrauded." In *Weyman's Case*, Judge Daniel lays down the rule, as follows: "Where goods have been obtained by means of fraudulent representations, it has been held that as the intent is a fact to be arrived at, it is competent to show that the party accused was engaged in other similar frauds about the same time; provided that the transactions are so connected as to time, and so similar in other relations, that the same motive may reasonably be imputed to them all."

And the same rule of evidence has been applied in civil actions. In *Allison v. Matthieu*, 3 Johns. 235, an action of trover, for goods fraudulently purchased of the plaintiff October 1, 1804, the plaintiff was permitted to show purchases of goods of two other persons, by similar representations, on the 5th day of November, 1804. In *Cary v. Hotelling*, 1 Hill, 311, the action was replevin to recover property claimed to have been obtained of the plaintiffs by the defendants by means of false representations as to their solvency and credit; and it was held that where the question is whether a vendee of goods procured the sale of them through fraud, distinct purchases made by him of others, under similar circumstances, at or about the same time, and when the like motive as the one imputed may reasonably be supposed to have operated, are admissible in evidence against him, with a view to the *quo animo*. In *Hall v. Naylor*, 18 N. Y. 588, there was a similar action, and Comstock, *J.*, said: "On the trial of such an

issue, the *quo animo* of the transaction is the fact to be arrived at; and it is therefore competent to show that the party accused was engaged in other similar frauds at or about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all." In *McKenney v. Dingley*, 4 Me. 172, the action was replevin for a horse claimed by the plaintiff to have been purchased of him by one Reed by false pretenses, July 12, 1824, and claimed by the defendant to have been fairly purchased by him of Reed. It was held competent for the plaintiff to prove, as tending to prove a fraudulent intention, that Reed on the ninth and tenth, and on one or two other days in July, and also on the nineteenth day of August, had made similar false representations to other persons, from whom he had succeeded in obtaining goods to a large amount. See also *Thompson v. Rose*, 16 Conn. 71; *Hawes v. Dingley*, 17 Me. 341; *Howe v. Reed*, 12 Me. 515; *Rowley v. Bigelow*, 12 Pick. 307; *Beal v. Thatcher*, 3 Esp. 194.

## CHAPTER XIII.

### THE INSTRUMENTALITIES OF EVIDENCE.

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### § 262. Of the Competency of Witnesses.

a. **Preliminary View.**—The progressive nature of the science of the law, its adjustability to the emergencies of the time, and the state of public sentiment, is best illustrated in the gradual evolution and development of the rules regulating the competency of witnesses. The common law inhibitions which sought to disqualify through interest, consanguinity and affinity a large proportion of the witnesses best adapted to elucidate a given fact have been almost wholly abrogated, and we are in a fair way of realizing the full triumph of Mr. Bentham's proposition that "in



the character of objections to competency, no objections ought to be allowed." (1 Benth. Ev. 3). It is beyond the scope and character of the present treatise to indulge in any historical survey of this evolutionary process. Like any other startling and permanent reform, it has had its era of adolescence and agitation,—its formative state of gestation and molding, and its final birth, amidst doleful predictions of legal Solons who had outlived both their faculties and usefulness.

The inception of this reform was with the opening of the century, but it was not until the reign of William IV. that its salutary principles crystalized into the form of parliamentary acts. From that time on, there has been a constant tendency to relax the exclusionary regulations of the common law, until at the present day, it may be affirmed without fear of contradiction that competency resides in every person without reference to age, sex or conditions. The most hardened criminal who has ever disgraced a felon's cell is competent to give his testimony,—the most notorious and abysmal liar may give his version of an incident or fact in open court without fear of a disqualifying statute, and in fine there is no grade of mental, moral or social disqualification, with but few exceptions, sufficiently marked to absolutely divest a person of his rights to the witness stand.

The constant tendency of modern legislation for the last fifty years wherever this subject of competency has been involved, has been toward a practical emancipation from all restrictive or reactionary views, and it is impossible to state the summary and result with greater precision or sententiousness than by quoting the epigrammatic rule announced by *Sir James Stephen*: "All persons are competent to testify in all cases except as hereinafter excepted." It may be affirmed that the only survival of the early rules—once so complicated and innumerable—is in the exclusionary regulation regarding the competency of witnesses, in questions where their evidence is inimical to the property or estate of a deceased person, and their testimony directly refers to a personal transaction or communication between the witness and the decedent. These rules of exclusion will receive an extended treatment further on. Our present concern is with competency, not incompetency. The first and most obvious exception to the general competency of witnesses obtains in the case of lunacy or mental aberration in any degree which is of so pronounced a character at the time of trial as to render the testimony given by

one so afflicted unreliable and unworthy of belief. *Hartford v. Palmer*, 16 Johns. 143; *Gebhart v. Shindle*, 15 Serg. & R. 235; *McDowell v. Preston*, 26 Ga. 528; *Holcomb v. Holcomb*, 28 Conn. 177; *Coleman v. Com.* 25 Gratt. 865; *Livingston v. Kiersted*, 10 Johns. 362; *Kendall v. May*, 10 Allen, 59; *Campbell v. State*, 23 Ala. 44; *Sarbach v. Jones*, 20 Kan. 497, 500; *State v. Underwood*, 6 Ired. L. 96; *Gould v. Crawford*, 2 Pa. 89.

The laws of the State in which the federal court sits constitute the rules of decision as to the competency of witnesses under the Judiciary Act, § 34 (preserved *totidem verbis* in Rev. Stat. § 721); but only in cases not provided for by the statutes of the United States. *Potter v. Third Nat. Bank of Chicago*, 102 U. S. 163, 26 L. ed. 111; *King v. Worthington*, 104 U. S. 44, 26 L. ed. 652.

A general rule is always infected with some infirmities, and it is usually conceded that the exceptions under the rule are of greater importance than the fundamental rule itself; that is to say, the observance of the exceptions exacts a more minute and microscopic knowledge of the principles embodied in the law relating to the subject than the knowledge necessary to retain the elementary principles stated by the rule itself. This truth finds partial vindication in this connection by reference to the law governing the competency of witnesses, which is the topic under review in a subsequent chapter. It will abundantly appear that competency is the general rule and that the liberalizing tendency of modern legislation has left but few survivals of the ancient disqualifying laws.

**b. Incompetency the Exception.**—Incompetency, then, must be regarded as the exception, and we can briefly advert to the present statutory law upon the subject, without the fear of encumbering the text with the least suggestion of the ancient subtleties that formerly characterized this branch of our subject.

**c. Statutory Provisions.**—The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted,

against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." Amendment, approved April 16, 1880; Cal. Code Civ. Proc. § 1880.

The California Code of Civil Procedure embodies the best features of modern legislation on this topic of competency. Section 1879 of that Act crystalizes the juridical sentiment upon the subject, and it may be quoted as typical of the law as at present understood by the judiciary of the United States.

The following is the context of the section referred to:

All persons, without exception, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section eighteen forty-seven. Cal. Code Civ. Proc. § 1879.

**d. Interpretation of Decisions.**—The state tribunals, in their interpretation of this law, have vigorously sustained the liberal position it so manifestly indicates, and in *People v. McGuire*, 45 Cal. 57, the broad principle was affirmed by an undivided court, "that no witness can be excluded in any case on account of nationality or color," and one who has been convicted of felony may testify. *People v. McLane*, 60 Cal. 412.

The law of Illinois is of the same import. Section 488 of the Revised Statutes of that State, regarding the competency of witnesses, is in the following unequivocal language:

"No person shall be disqualified as a witness in any civil action, suit or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime, but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proved like any fact not of record, either by the witness himself (who shall be compelled to testify thereto), or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence."

I shall proceed to show how far the averments of the text are sustained by judicial authority.

**e. General Abrogation of Former Disqualifying Law.**—Express legislation in many States has wholly abrogated former rules of disqualification by reason of crime, and a party may now show the record of conviction merely for the purpose of impairing the credibility of a witness. For authorities sustaining this proposition, see: General Statutes of Colorado, § 3641, etc. (1883); Delaware Laws of 1874, p. 652; Connecticut Rev. Stat. 1849, title 1, § 141; Gen. Stat. 1875, p. 440; Georgia Code 1882, § 3854. See also *Frain v. State*, 40 Ga. 529; Illinois Rev. Stat. 1880, p. 505, § 1; *Bartholomew v. People*, 104 Ill. 601; Indiana Code, § 243; *Glenn v. Clore*, 42 Ind. 60; Iowa Code, 1851, art. 2388; Rev. Code 1880, § 3636; Kansas Comp. Laws, 1879, § 3847; Maine Laws 1861, chap. 53; *Woodman v. Churchill*, 51 Me. 112; Massachusetts Gen. Stat. chap. 131, § 13; Pub. Stat. chap. 169, § 18; Laws 1852, chap. 312, § 60; *Newhall v. Jenkins*, 2 Gray, 562; Michigan Rev. Stat. 1846, chap. 102, § 99; Laws 1861, chap. 125, p. 118; Missouri, see *United States v. Biebusch*, 1 Fed. Rep. 213, 1 McCrary, 42; Minnesota, Stat. 1878, p. 792, § 7; New Hampshire Gen. Laws 1878, chap. 228, § 27; New Jersey Rev. 378, § 1; N. Y. Laws 1869, chap. 678; Code Civ. Proc. § 832; *Donohue v. People*, 56 N. Y. 208; *National Trust Co. v. Gleason*, 77 N. Y. 400; *Perry v. People*, 86 N. Y. 353, 62 How. Pr. 148; *People v. McGloin*, 91 N. Y. 241; North Carolina, Batt. Rev. 1873, p. 388, § 14; *State v. Harston*, 63 N. C. 294; Rhode Island Pub. Stat. 1882, chap. 214, § 38; Vermont Rev. Stat. 1880, § 1008; Virginia, *Johnson v. Com.* 2 Gratt. 581; and Wisconsin Rev. Stat. 1878, § 4073; *Sutton v. Fox*, 55 Wis. 531.

The exceptions to the general competency of witnesses, naturally suggest the antithetical title of incompetency, and in the succeeding chapter we propose a careful review of the authorities which enforce the principles of disqualification.

The rule as stated in the text is either expressly approved, or impliedly acknowledged throughout the various jurisdictions of this country. Many of our decisions elaborately discuss the doctrine of competency, but it has been reserved for a distinguished New England jurist to state the ripest conclusions of intelligent observation on this somewhat obscure phase of law.

**f. Theory of Ch. J. Appleton.**—The Hon. John Appleton,

Chief Justice of Maine, in the preface to his valuable work on "The Rules of Evidence" states the result of his research and experience to be: 1. "All persons, without exception, who having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses; 2. That objections may be made to the credit but never to the competency of witnesses; 3. That while the best evidence should always be required, the best existing evidence should not be excluded because it is not the best evidence of which the case in its nature is susceptible." The learned author goes on to say that many of the reforms pointed out in his essay have been partially adopted. Interest and infamy, in very many states, have ceased to be ground for the exclusion of testimony. A limited admission of the testimony of the husband and wife has been allowed in cases where one or the other is a party. The parties in civil cases, with greater or less restrictions upon their testimony, have been received or compelled to testify in their own cases. In offenses of the lowest grade of criminality the accused in one State (and since then in others) has been admitted as a witness in his own behalf. But incompetency from defect or from a want of religious belief, is still the law in most of the states. The law as to confessions and hearsay continues in a condition pre-eminently chaotic. Different courts and the same court on different occasions, employ differing modes of extracting proofs. So far as changes have been made, their practical working in the administration of the law has been such as to make it a matter of astonishment how courts could have ever hoped to administer justice, when the evidence now received was excluded.

§ 263. **What Witnesses are Incompetent.**—The exceptions which are still indulged to the rule of universal competency, are in favor of extreme youth, disease affecting the mind, and in many jurisdictions.

We have already noted in the chapter on mental, moral and social disqualification certain other elements, such as intoxication from liquor or opium, infamy and cognate causes. I shall now examine these exceptions in their order. After prefacing the admonition that while the law within the limitations we are about to mention, recognizes the competency of all men as witnesses, the question of their credibility may be seriously affected or totally impaired, and in some instances utterly annihilated by

the disclosure of the cross-examination whereby the moral, rottenness of the witness is exposed; the entire absence of moral sense of accountability—the strong presence of a dominating sense, a personal gain or advantage—the equally controlling influences of affections and consanguinity, and in some instances the impulse and domination of pure, defecated malice. All these and other factors affecting the credibility of the witness are proper items for consideration, and in many instances, are of vital importance in the proper determination of the case.

**a. Incompetency Arising from Relationship.**—There are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband without his consent, nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon, in the course of professional employment;

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline, enjoined by the church to which he belongs;

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient;

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. Cal. Code of Civ. Procedure, § 1881.

**b. From Idiocy or Lunacy.**—Where the degree of idiocy or lunacy is such as to impair the understanding, cloud the memory, thicken the speech and benumb the faculties, it works disqualification of the witness, and under every rule of propriety the person so situated should be excluded from the stand. Wherever their

condition is such that they do not comprehend the nature of an oath, they should be rejected. *Livingston v. Kiersted*, 10 Johns. 362; *Coleman v. Com.* 25 Gratt. 865.

The United States Supreme Court, in a very recent case, has passed upon this question of competency as regards a lunatic. The principle formulated by that decision and sustained by a conclusive array of authority is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matter which he has seen or heard in reference to the questions at issue.

It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for other causes, must be passed upon by the court, and to aid its judgment, evidence of his condition is admitted. Lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangements on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618.

Chief Justice Campbell said that he entertained no doubt that the rule laid down by *Baron Parke* in an unreported case (which had been referred to), was correct, that wherever a delusion of an insane character exists in any person who is called as a witness, it is for the judge to determine whether the person so called has a sufficient sense of religion in his mind and a sufficient understanding of the nature of an oath, and it is for the jury to decide what amount of credit they will give to his testimony.

**c. Infamous Persons.**—The incompetency of a witness should never be presumed; it is always incumbent upon the party alleging incompetency to prove it. Infamy, under the laws of the United States, no longer operates as a disqualification, but conviction for crime may be always shown as affecting the credibility of the witness.

It is a general rule of wide acceptance and manifest policy to allow the introduction of the record of conviction for crime, in evidence for the purpose of discrediting a discreditable witness. *Mead v. Boston*, 3 Cush. 404. In other cases, however, it has been held that such judgments may, under some circumstances, be received in civil actions as prima facie evidence of the fact of guilt, but never as conclusive, or as estopping the party convicted from proving his innocence.

One strong reason assigned for not holding them conclusive is the absence of any mutuality in the estoppel. The confusion which is sometimes perceptible in the cases on this subject, results from losing sight of the distinction between the purposes for which such judgments are offered, whether as evidence of the fact and conviction and judgment, or of the fact of the guilt of the party. Such a judgment is conclusive for the purpose of establishing the fact that it has been rendered and all the legal consequences which flow from it. Therefore, when by law the fact of conviction disqualifies a witness, the record when introduced for that purpose is unimpeachable, and the evidence is for the court and not the jury. When offered for the purpose of establishing the fact of guilt there is a great weight of authority for the proposition that is not admissible in a civil case, but it is well settled that if admitted it is only prima facie evidence. *Sims v. Sims*, 75 N. Y. 466.

It was held in *Carpenter v. Nixon*, 5 Hill, 260, that a record of conviction of petty larceny was admissible as impeaching evidence, but that question is disposed of in two lines, the main question discussed being whether such a conviction disqualified the witness. Judge Johnson in *Gardner v. Bartholomew*, 40 Barb. 325, says that having examined the authorities cited in *Carpenter v. Nixon*, in support of the admissibility of the evidence, he doubts whether the evidence in point was properly decided. The authorities cited in *Chase v. Blodgett*, 10 N. H. 22, seem to afford much better support to the opposite view. Judge Allen in *Newcomb v. Griswold*, 24 N. Y. 298, holds that the fact of conviction of an offense which does not disqualify, if admissible at all must be proved by the record, and he says from the case in 5 Hill it is admissible, but he refers at the beginning of the opinion to the rule that evidence of a particular offense is not admissible, and he is not understood as approving the decision in 5 Hill. All that he decides is that oral evidence of such a condition is inad-



missible, even when coming from the lips of the witness sought to be impeached, but it is not necessary to pass upon the question now for the authorities clearly show that if a fact is proved in a civil case, by a record of conviction, in a criminal prosecution, that proof is not conclusive, but can be rebutted. In several jurisdictions infamy disqualifies, and the record of conviction can be introduced to impeach their credibility. New York retained upon its statute books this disqualifying legislation, until a comparatively recent period. Ohio, Indiana, Georgia, Wisconsin, Michigan and Delaware still retain the common law disqualification. Within those jurisdictions all persons convicted of crimes which render them infamous, are excluded from the witness box.

By special statutory enactment in Kansas a convict's testimony is admissible in civil cases, but he is disqualified in criminal trial. *Winter v. Sass*, 19 Kan. 556. See also *post*, § 268.

**d. Effect of Liquor or Opium to Disqualify.**—Disqualification of a witness through drunkenness or stupefaction through opium is usually of a temporary nature and usually results in mere delay in the reception of the evidence. There is one distinction that must be observed in this connection, viz.: that while in a case of idiocy or insanity, the party objecting to the witness must prove his incapacity, and may call witnesses for that purpose, yet in the case of a person called as a witness, while in a state of intoxication, the court may decide from its own view whether the witness is in such a situation that he ought not to be permitted to testify. *Hartford v. Palmer*, 16 Johns. 143. Compare *Gould v. Crawford*, 2 Pa. 89; *Cannady v. Lynch*, 27 Minn. 435. The intemperate habits of such a witness cannot be proved to impeach his competency. *Thayer v. Boyle*, 30 Me. 475.

In a late case in Washington Territory, it is held that the exclusion of an intoxicated witness from the court room and the refusal of the court to permit him to testify, is not error; but it might constitute ground for a new trial if the party who offered the witness informed the court of the importance of his testimony, and asked an adjournment of the trial until he became competent to testify, and the court refused the request. *Fox v. Territory*, 5 West Coast Rep. 339.

**e. Deaf Mutes, Competency of.**—One of the crowning glories of an advanced civilization and one of the grandest achievements in educational methods has been the emancipation of deaf mutes

from the horrible thralldom imposed by that forlorn and pitiful condition. The brutal dictum of *Lord Hale*, that persons so situated are to be deemed the same as idiots, has passed, like countless other whimwhams of the common law, into well merited oblivion. A doctrine so repugnant to every sentiment of benevolence, and so utterly at variance with even infantile observation, has very properly been utterly rejected by our courts, and upon sufficient understanding being shown, a deaf mute may be sworn and give his testimony through an interpreter. Such a witness is competent in *Indiana*, if he has sufficient discretion and understands that perjury is punishable by law, though he has no conception of the moral obligation of an oath.

If he can write sufficiently well to communicate ideas perfectly in that way, he will be required to give his testimony in writing (*Morrison v. Lennard*, 3 Car. & P. 127); but he may resort to signs, though it appears that he can read and write and communicate ideas imperfectly, by writing. *State v. De Wolf*, 8 Conn. 93; *Com. v. Hill*, 14 Mass. 207; *People v. McGee*, 1 Denio, 19, 24; *Reg. v. Guttridge*, 9 Car. & P. 471; *Reg. v. Megson*, 9 Car. & P. 428.

**f. Infancy as a Disqualification.**—Under the Code Napoleon, children under the age of 14 years will not be presumed to have sufficient understanding to be a witness (*State v. Richie*, 28 La. Ann. 327); and the admission or rejection of a person as a witness is largely within the sound discretion of the court.

There is no precise age at which children are competent or incompetent. The question of competency is not to be determined by any precise age, but by apparent capacity. *Brown v. State*, 2 Tex. App. 115; *State v. Richie*, 28 La. Ann. 327; *Draper v. Draper*, 68 Ill. 17; *Flanagan v. State*, 25 Ark. 92. Children of seven, eight and nine years of age are frequently sworn, and there is so wide a difference in the capacity of children that many of them are more intelligent at nine years of age than others are at ten or twelve. Children of fourteen are presumed to be competent, and those who are younger than that will be sworn if they are really competent. Investigation, however, may disclose a sufficient understanding. *Davidson v. State*, 39 Tex. 129. And where a child eight years of age testified that she did not know what the Bible was, but believed she must tell the truth on the stand, or be punished hereafter, she was permitted to testify. *Com. v. Carey*,

2 Brewst. 404, and see *Vincent v. State*, 3 Heisk. 120; *Logston v. State*, 3 Heisk. 414.

When a child is intelligent, the court will permit him to be sworn as a witness, leaving the value of his evidence to the jury. When a child under fourteen years of age is offered as a witness, the justice should examine him, so as to ascertain whether he is competent, provided such a request is made by the opposite party. *People v. McNair*, 21 Wend. 608. If the child is naturally intelligent, but does not fully understand the nature of an oath, the justice may instruct him, by informing him of the moral obligations and of the legal consequences of false swearing. This may be done at the trial, before swearing the witness. N. Y. Code Civ. Proc. § 850.

If the court examines a child to test its competency as a witness and finds it incompetent, it must be a very flagrant case of error to authorize an appellate court to reverse the judgment. *Peterson v. State*, 47 Ga. 524.

**g. General Rule as to Infants.**—The rule insisted on in all the books is, that “the admissibility of children as witnesses depends, not merely upon their possessing a competent degree of understanding, but also in part, upon their having received such a degree of religious instruction as not to be ignorant of the nature of an oath, or of the consequences of a falsehood. In *Rex v. Williams*, 7 Car. & P. 298, a child eight years old, who, up to the time of the event of which she was to testify, had received no religious training, nor had ever heard of God, or of future rewards and punishments, and has never prayed, and who in the interval (about sixteen weeks) between that time and the trial, had been twice visited and instructed by a clergyman, as to the nature and obligation of an oath, but still appeared manifestly to have no real understanding on the subject of religion or a future state, was not permitted to testify. In Massachusetts, it was said in 1813, that by the latter opinions it was the settled law at that time “if an infant appear, on the examination by the court, to possess a sufficient sense of the wickedness and danger of false swearing, he may be sworn, although of ever so tender an age. The credit of the witness is to be judged of by the jury, from the manner of his testimony, and other circumstances. *Com. v. Hutchinson*, 10 Mass. 225.

**h. Court may Instruct Infant as to Nature of an Oath.**—If, after the event of which he is to testify, a child previously

ignorant, is by instruction made to understand the nature of the obligation to speak the truth, which is imposed by an oath, he is then a competent witness. And it has been held that the trial of a criminal cause may be postponed, when an important witness for the prosecution is a child, that he or she in the meantime may receive such instruction (*King v. White*, 1 Leach, 430, note; *Reg. v. Nicholas*, 2 Car. & K. 246); but disapprobation of such a practice has been expressed by other judges. In Cowen & Hill's *Notes* to Phillips on Evidence, the case of one Jenner is cited, in which a girl nine years old, very intelligent, but ignorant of the nature of an oath, and of the moral penalty of false swearing, was instructed by the judge on the spot, and then sworn. And so essential is it to the repression of crime, that the public shall not in all cases be deprived of the testimony of those, however low in the scale of civilization, who have memory and intelligence enough to relate what they have seen and know, that formerly a statute of this State made it the duty of the presiding judge, whenever a negro slave was a witness, "to explain to him or her the nature of the oath to be administered, and to state to him or her the punishment for swearing falsely;" it being assumed that such instruction would be sufficient to qualify those most ignorant in these particulars, who were not deficient of mind, to be sworn and give evidence to be considered by the jury. Clay, Dig. 473.

When, however, a child of tender years is produced as a witness, it is the duty of the presiding judge to examine him or her without the interference of counsel further than the judge may choose to allow, in regard to the obligation of the witness's oath; and in proper cases, to explain the same to one intelligent enough to comprehend what he says; and then to determine whether or not such child shall be sworn and permitted to testify. *Carter v. State*, 63 Ala. 52.

A child produced as a witness who understands that he is brought into court to tell the truth, and that it is wrong to tell a lie, has sufficient understanding of an oath to be competent. *State v. Levy*, 23 Minn. 104. So held of a girl nine years old, who testified on her *voir dire*, that she understood the nature of an oath, and that if she did not tell the truth, she would get into hell-fire (*Draper v. Draper*, 68 Ill. 17); and of another, who on being asked what would become of her if she swore a lie, answered "I shall go to the bad world." *Vincent v. State*, 3 Heisk. 120. So held also that

where the answer was "The bad man will get me." *Logston v. State*, 3 Heisk. 414.

**i. No Precise Age Insisted On.**—There is no precise age at which children are competent or incompetent. The intellectual development of many children is a matter of amazement to many observers, while the sluggish and planetary growth of other infantile minds is a perplexity to friends and a mortification to parents. No formulas can be enacted on the subject, and it is for the trial court in all instances to determine whether the sufficiency of their understanding, their sense of the solemnities surrounding the administration of an oath, and their realization of the force and effect of the penal statutes regarding perjury are likely to invest their testimony with the attributes of truth and verity.

The question of competency is to be determined, not by any precise age, but apparent capacity. Children under the age of fourteen will not be presumed to have sufficient understanding to be a witness, but investigation may disclose entire qualification. *State v. Richie*, 28 La. Ann. 327; *Draper v. Draper*, 68 Ill. 17; *Flanagin v. State*, 25 Ark. 92.

In an English case a child being the principal witness and unacquainted or uninstructed in the nature of an oath, the trial of the cause was postponed until the desired information could be imparted to the witness. *Rex v. Wade*, 1 Mood. C. C. 86.

The admission or rejection of the person as a witness after such examination must depend upon the sound discretion of the court. *State v. Richie*, 28 La. Ann. 327. If the court examines the child to test its competency as a witness, and finds it incompetent, it must be a very flagrant case of error to authorize an appellate court to reverse the judgment. *Peterson v. State*, 47 Ga. 524.

A boy of ten years is a competent witness if he understands the nature of an oath, and of this the court is to be the judge. *Moore v. State*, 79 Ga. 498.

Where it appears that a girl six years old, charged to have been raped, does not understand the nature of an oath and has no conception of future punishment, she is not a competent witness in a prosecution for the alleged rape. *Johnson v. State*, 76 Ga. 76 n.

Questions of competency in criminal actions will receive further elaboration in a subsequent volume of this work.

In a recent Texas case a child who, on being examined as to

her knowledge of the nature of an oath stated that "she did not know what the gentleman meant when he held up his hand." Held in the absence of subsequent information that she was incompetent to testify. *Holst v. State*, 23 Tex. App. 1.

An instruction to a child clearly ignorant of the obligation of an oath that "if you were to tell a story in the court-house after being sworn, it will be very wrong and that you might be sent to the penitentiary, and that if you die, you might go to the bad man,"—is insufficient. *Ibid.*

§ 264. **Incompetency Arising From Transactions With a Deceased Party.**—The most obvious principles of equity have conspired to place upon the statute books of many jurisdictions prohibitory legislation touching the testimony of living witnesses as against the estates of a deceased person.

a. **Reasons for this Exclusionary Rule.**—The principle that has contributed to give ascendancy and permanency to this pillared law springs from the universal sense of injustice and outrage, evoked by any rule allowing indiscriminate testimony as to a prior indebtedness of a deceased person whose version of the incidents, connected with such liability, might, if procurable, entirely alter the aspects of the case, and doubtless in many instances establish beyond the adumbration of a doubt the gross perjury and abhorrent duplicity of the claimant. As a precaution against imposition and fraud, and the indiscriminate plundering of a decedent's estate, most jurisdictions have enacted a series of incapacitating statutes which effectually circumvent the most adroit manipulation of witnesses as regards manufactured evidence against the property right of heirs and next of kin.

There is considerable diversity in the phraseology of these statutes and some discrepancy in detail, but the intent, scope and character of all disclose the legislative intent to suppress the least tendency towards perjured testimony as regards the former rights of one whose lips are closed in death.

Expressive of this intent and typical of the legislation on this subject, is the well known section (829) of the New York Code of Civil Procedure. We subjoin the full text of this much controverted statute.

"Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or inter-

ested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or interest or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, supervisor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

No one section in the code procedure has been subjected to more drastic analysis and rigid scrutiny than this. It has been the repeated subject of judicial interpretation—and we may add, of contradictory interpretation. It has been subjected to legislative handicraft, amended, enlarged and restricted. It has been remanded to the courts for judicial interpretation and by the courts remitted to the Legislature, until the phase it assumes today embodies the result of full thirty years' practical illustration of its scope and efficiency.

The intention of this section is "that the surviving party to the transaction in issue shall not have the unfair advantage of giving his version of the matter, when the other and adverse party is prevented by death from being heard to contradict or explain it. *Card v. Card*, 39 N. Y. 317.

The obvious intention is to preserve equality and prevent unfair advantage. The mouth of the survivor is closed because the other party to the transaction is dead, and to allow the living witness to speak, secure from the contradiction or correction of his adversary, is to give him an advantage manifestly unfair and dangerous to the truth. Such inequality and injustice does not exist, however, where the deceased party has spoken and his statement of a transaction has been put in evidence. In that event, to allow the dead man to speak through his declarations while living, and deny the right of contradiction or correction to the surviving party, would shift the unfair advantage to those represent-

ing the deceased party, and it was to obviate such injustice that the exception in the statute was framed. *Potts v. Mayer*, 86 N. Y. 302.

In the case of *Holcomb v. Holcomb*, 95 N. Y. 316, and more recently in *Re Eysman's Will*, 3 L. R. A. 599, 113 N. Y. 62, the New York Court of Appeals has given such a construction to this provision of the Code, as will prohibit a person interested in the event from giving such evidence as would disclose the nature of a conversation or transaction with a person since deceased. The ground for the ruling is, "That communications in the presence of a witness are deemed to be made to him." While the ruling may be said to be stretched to the extremest tension, it has the merit possibly of being in furtherance of justice. *Re Dunham's Will*, 121 N. Y. 575.

**b. Statutory Provisions.**—New York Code Civ. Proc. § 829, rendering inadmissible testimony as to conversations and transactions between the witness and a decedent was not intended to abrogate the rule of evidence that where a party calls a witness and examines him as to a particular part of a transaction or communication, the other party may call out the whole of the transaction or communication bearing upon or tending to qualify the particular part to which the examination of the other was directed. *Davis v. Gallagher*, 55 Hun, 593.

South Carolina Code, § 400, rendering incompetent testimony of parties having an interest against a decedent's estate, etc., was not intended to compel a party to remain silent when he is willing to testify against his own interest, even if his testimony should affect the rights of others. *Shell v. Boyd*, 32 S. C. 359.

The provision of Kentucky Civ. Code, § 606, rendering inadmissible evidence as to personal transactions and conversations of the witness with the decedent does not prevent one contesting a will from testifying to the conduct, conversations and characteristics of the testator. *Williams v. Williams*, 11 Ky. L. Rep. 828.

A witness is competent to testify as to a personal transaction with a decedent in which he has no interest, although not to a transaction in which he is interested. *Mason v. Prendergast*, 120 N. Y. 536.

The exclusion of the testimony of a party under Wisconsin Rev. Stat. § 4069, in respect to transactions with a deceased or insane person does not extend to the testimony of an agent. *Hanf v. Northwest Masonic Aid Asso.* 76 Wis. 450.



The statute declaring parties to actions and persons interested in the event thereof incompetent to testify to conversations with or admissions of deceased persons relative to a matter in issue is inapplicable to an agent of a party to the action, not himself a party to the action, or having any legal interest in it. *Darwin v. Keigher*, 45 Minn. 64.

New York Code Civ. Proc. § 829 does not prevent a party to the record from testifying to conversations between herself and a decedent, which are against her interest. *Davis v. Gallagher*, 55 Hun, 593.

South Carolina Code Civ. Proc. § 400, rendering inadmissible testimony as to transactions between a party to an action and a deceased person does not render an heir incompetent to testify as to a communication between his ancestor and the ancestor of a co-defendant whose interest is adverse. *Moore v. Trimmier*, 32 S. C. 511.

Under New York Code Civ. Proc. § 829, rendering inadmissible testimony as to the transactions and communications between a party interested and decedent contestants of a will cannot examine a daughter of deceased as to personal transactions and communications between herself and her father. *Re Lasak's Will* (Sup. Ct.) 31 N. Y. S. R. 203.

**c. Section 829, New York Code.**—This celebrated section (829), the full text of which is given at page 541, *ante*, contemplates the exclusion of a witness from the stand, on certain conditions being shown. It has been the subject of very minute juridical interpretation, by the New York Court of Appeals in a very recent case (*Eisenlord v. Clum*, 126 N. Y. 552), and the opinion of *Judge Peckham*, may be justly regarded as the ablest exposition of the scope and nature of the law, as affected by the recitals of, and exceptions referred to. The opinion proceeds in the following language: "Prior to the adoption of the Code the law excluded interested witnesses from testifying. What amounted to such an interest as would exclude a witness was a question which was frequently presented, and in almost every conceivable phase, and the courts had finally settled down to a general rule on the subject, which had long prevailed before the Legislature altered it.

At common law, as the rule became developed by successive decisions, the interested witness was excluded only when he had

what was termed a legal interest in the event of the action. A direct and certain interest in the event in the record for the purpose of evidence, became necessary in order to exclude. Stark. Ev. (9th ed.) marg. pp. 23, 24.

The inclination of the courts was towards a holding that the fact of interest should go to the credit rather than to the competency of the witness, and hence they said that the party alleging incompetency should show it beyond doubt. The English legislature interfered with the rule as to the record, and provided that it should not be evidence in another action for or against the witness who testified. 3 and 4 Wm. IV. chap. 42, § 26. Then under the suggestion of *Lord Denman*, another act was passed limiting very greatly the cases in which a person should be excluded by reason of interest. 6 and 7 Vict. chap. 85.

In New York the question arose at an early date, and in one of the pioneer cases, *Van Nuys v. Terhune*, 3 Johns. Cas. 82, the rule as above stated was declared to be the law. It was therein explained that a witness was not interested in the event of the cause unless he would gain or lose by the event, and he was not interested by the record unless the verdict could be given in evidence for or against him in some other proceeding. In a note to this case it is stated that the rule was formerly that an interest in the question put to the witness excluded him, but it was admitted that such rule had been explained away and limited, so that the one announced in the case was the true rule. This case was decided in 1802.

In *Jackson v. Bard*, 4 Johns. 230, it was held that the widow of one Dickinson, who was the mediate grantor under whom the defendant claimed the land in question, was a competent witness, although it was argued she might claim dower in case the deed had not been executed. The Supreme Court held the decision correct, and said she was not an interested witness, because the verdict in the cause could never be given in evidence in an action of dower brought by her.

Then in *Jackson v. Van Dusen*, 5 Johns. 144, which was an action of ejectment, it was distinctly held that the widow of a person deceased was a competent witness in an action brought by the heir to recover the possession of lands claimed under her husband, though she would be entitled to dower in such lands. Van Ness, *J.*, delivered the opinion of the court, and said the

witness had no other interest in the case than that which grew out of her right of dower in the premises, and as to that the verdict in the case would be no evidence in a suit to be brought by her for the recovery of her dower.

In *Jackson v. Nelson*, 6 Cow. 248, it was held that in an action of ejectment against a devisee, a co-devisee and tenant in common with the defendant, not in actual possession, might be a witness for defendant because the effect of a recovery by the plaintiff would not be to turn him out of any possession, nor could the verdict be evidence for or against him in any other suit.

Again in *Jackson v. Brooks*, 8 Wend. 426, 431, an action of ejectment, it was held that a tenant by the curtesy was a competent witness for the plaintiff, who was the heir at law. The court said the witness could not use the verdict if the plaintiff recovered, as evidence in his favor in any suit he might bring to enforce his title as tenant by the curtesy, and hence he had but an interest in the question and not in the event of the suit. (See also Peake, Ev. (Norris's notes), 209, pt. 1, chap. 3, § 3; 1 Greenl. Ev. § 386 *et seq.*) The interest must be certain, direct, not contingent or remote, or a mere possible benefit.

The expression "interest in the event," as used in our statute, was never intended to enlarge the class to be excluded under it beyond that which the common law excluded in using the same language.

All legislation on the subject has been in favor of greater liberality in the rules relating to the competency of witnesses. Upon referring to the cases which have been decided under the section of the Code already referred to, we find that the rule defining what is an interest in the event is laid down in about the same terms as those above referred to.

§ 265. **Objection to Competency, Taken When.**—In regard to the proper time of taking the objection to the competency of the witness, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the examination in chief. Indeed, it has been frequently said by judges and sometime so held, that a party who is aware of any disqualification, cannot lie by and allow the witness to be examined, and afterwards object to his competency, if he should dislike his testimony. In *Yardley v. Arnold*, 10 Mees. & W. 145, Parke, *B.*, observed, "I cannot help wishing very much that it were established as the reg-

ular practice, that, when once a witness is sworn, no question should be put to him in order to raise objections to his competency; I think all such should be put to him on the *voir dire*; and that when once sworn in chief, his competency should be taken for granted; but certainly the practice has been different hitherto."

In England, the Court for Crown Cases Reserved has also decided that a judge had acted rightly, who, after pronouncing a witness competent on the *voir dire*, discovered during the examination that he was really incompetent, and consequently rejected his testimony, though part of it has already been reduced to writing. *Reg. v. Whitehead*, 35 L. J. M. C. 186, 1 L. R. C. C. 33, 10 Cox, C. C. 234. The rule on this subject is the same in equity as in law (*Needham v. Smith*, 2 Vern. 463; *Vaughan v. Worrall*, 2 Madd. 322, 2 Swanst. 400; *Selway v. Chappell*, 12 Sim. 113; *Swift v. Dean*, 6 Johns. 523-528; Gresl. Ev. 234-236. See *Bousfield v. Mould*, 1 DeG. & S. 347; and in criminal as in civil cases; *Lord Lovat's Case*, 18 How. St. Tr. 596; *Com. v. Green*, 17 Mass. 538); but perhaps, in trials for high treason, the old doctrine would be recognized, that if a prisoner objects to a prisoner witness as being omitted from or misdescribed in the list furnished to him, he must do so before the witness is sworn in chief. *Rex v. Watson*, 2 Stark. 108, 32 How. St. Tr. 496, 497; *Reg. v. Frost*, 9 Car. & P. 183. In ordinary cases if the objection to the competency of a witness be not taken until after the trial, it will be considered as coming too late; and the courts will not grant a new trial for this cause alone. *Turner v. Pearce*, 1 T. R. 717; *Jackson v. Jackson*, 5 Cow. 173. But see *Jacobs v. Layborn*, 11 Mees. & W. 691. In *Barbat v. Allen*, 21 L. J. Exch. 156, Parke, B., referring to the Irish case of *Birch v. Somerville*, 2 Ir. L. R. N. S. 243, in which Lord Clarendon was examined without being sworn, but the examination not having been insisted on at the time, the court refused to disturb the verdict, unless the incompetency were known and concealed by the party producing the witness. *Niles v. Brackett*, 15 Mass. 378, or other evidence can be given of *mala praxis* on his part. *Wade v. Simeon*, 2 C. B. 342.

. § 266. **Swearing Interpreter, Form of Oath.**—Where a witness is offered who is ignorant of the English language, he must be sworn and examined through an interpreter who must be first sworn. *Schall v. Eisner*, 58 Ga. 190; *Leetch v. Atlantic Mut. Ins. Co.* 4 Daly, 419.

The form of the interpreter's oath may be as follows:

"You do swear that you will accurately and truly interpret between the court, the jury and the witness, A. B., in this action between John Doe, plaintiff, and Richard Roe, defendant."

When no jury is called, omit the words "the jury" in the form of the oath. After the interpreter is thus sworn, the oath is administered to the witness, by being repeated by the court to the interpreter, and by the latter to the witness. The examination of the witness is conducted by putting the questions to the interpreter, and by his immediately relating the substance of the question in the language which such witness speaks or understands.

Deaf and dumb persons are examined by means of an interpreter, even in the most important cases; but where such a witness can write, the best mode is to require written answers. *Morrison v. Lennard*, 3 Car. & P. 127. The aid of an interpreter is proper in every case in which there cannot be an intelligible communication between the witness and the counsel, court and jury.

### § 267. Common Law Features of Incompetency.

a. **Mental, Moral and Social Disqualification.**—At common law the disqualifications which rendered a witness incompetent to give any evidence at all were: 1. Insufficient understanding; 2. Refusal to be sworn or to acknowledge the sanction of an oath; 3. Infamy arising from conviction of crime; 4. Position of the proposed witness as a party to the controversy under investigation; and 5. His being interested in the event of the matter in issue to any extent, no matter how trifling.

Certain conditions of mental leprosy called for positive exclusion of such unfortunates from the witness stand. Under whatever causes this disqualification may arise, if it is sufficiently apparent that through excessive indulgence in liquor or drugs, or through the disintegration of protracted disease, or from the fatal effects of serious injury or congenital malformation, the person offered as a witness is so far deprived of mental grasp—is so smitten with the horrors of intellectual scurvy, as to be unintelligible, incoherent or driveling, then and in that event the disqualifications we were considering, ensue.

The earlier treatises upon the subject of evidence, contain much curious disquisition on this subject of moral disqualification. The entire tenor and trend of the early adjudications, fortified in many instances by statutory enactments refused to recognize com-

petency of a witness, who was incapable of apprehending the sanctity of an oath. To the antiquarian or the historical student, interested in the evolution of constitutional right and religious toleration, these obsolete utterances of the early jurists are both interesting and instructive, and, however attractive and beguiling this field of research has proved to the present writer, the practical purposes of a live energizing work on evidence, forbid the least intrusion into this domain. Within a comparatively recent period, this controversy has been reopened with all the dialectic and polemic skill that can characterize the ripest scholarship or the most envenomed pen. The case of Mr. Bradlaugh, in his contest for his parliamentary rights has unfolded the bigotry and intolerance of nineteenth century civilization, and the only marvel is, that under such persistent opposition, individual rights, freedom of conscience, or exemption from religious test has prevailed at all.

Lord Hardwicke, with a sumptuous mental equipment,—a tenacious grasp of every legal subtlety, a marvelous knowledge of *minutia*, detail and technique, is authority for the following paragraph: "The law is wise in requiring the highest attainable sanction for the truth of testimony given; and is consistent in rejecting all witnesses incapable of feeling this sanction, or of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity, it does not impute guilt or blame to either. If the witness is evidently intoxicated, he is not allowed to be sworn; because for the time being he is evidently incapable of feeling the force and obligation of an oath. The *non compos* and the infant of tender age are rejected for the same reason, but without blame. The atheist is also rejected, because he, too, is incapable of realizing the obligation of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not to the cause or the manner of the avowal. Whether it be calmly insinuated with the eloquence of Gibbon, or roared forth in the disgusting blasphemies of Paine, still it is atheism; and to require the mere formality of an oath from one who avowedly despises, or is incapable of feeling its peculiar sanctity, would be but a mockery of justice." See 1 Stark. Ev. 22.

These utterances are but too typical of the limitations imposed upon witnesses refusing to submit to a religious test or to avow their belief in a Supreme Being. The course of legislation in this country has been throughout with a marked tendency to reform the abuses this intolerant prescription entailed. Our insti-

tutions were fashioned by pioneers in intellectual and religious emancipation, by men under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, as exemplified in our domestic as well as in our foreign annals.

Some of the state constitutions have also done away with the distinctions which existed at the common law regarding the admissibility of testimony in some cases. All religions were recognized by the law to the extent of allowing all persons to be sworn and to give evidence who believed in a superintending Providence, who rewards and punishes, and that an oath was binding on their conscience. But the want of such belief rendered the person incompetent. Wherever the common law remains unchanged it must, we suppose, be held no violation of religious liberty to recognize and enforce its distinctions; but the tendency is to do away with them entirely, or to allow one's belief to go to his credibility only, if taken into account at all. *Cooley, Const. Lim.* § 478.

Upon this point the leading case is *Omichund v. Barker*, Willes, 538, and 1 Smith Lead. Cas. (5th Am. ed.) 535, where will be found a full discussion of the cases. Some of the earlier American cases required of a witness that he should believe in the existence of God, and of a state of rewards and punishments after the present life (see especially *Atwood v. Welton*, 7 Conn. 66); but this rule did not generally obtain; belief in a Supreme Being who would punish false swearing, whether in this world or in the world to come, being regarded as sufficient (*Cubbison v. M'Creary*, 2 Watts & S. 262; *Blocker v. Burness*, 2 Ala. 354; *Jones v. Harris*, 1 Strobb. L. 160; *Shaw v. Moore*, 4 Jones, L. 25; *Hunscom v. Hunscom*, 15 Mass. 184; *Brock v. Milligan*, 10 Ohio, 121; *Bennett v. State*, 1 Swan, 411; *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541; *Arnold v. Arnold*, 13 Vt. 362), but one who lacked this belief was not sworn, because there was no mode known to the law by which it was supposed an oath could be made binding upon his conscience. *Arnold v. Arnold*, 13 Vt. 362.

The States of Iowa, Minnesota, Michigan, Oregon, Wisconsin, Arkansas, Florida, Missouri, California, Indiana, Kansas, Nebraska, Nevada, Ohio and New York have constitutional provisions expressly doing away with incompetency from want of religious belief. Perhaps the general provisions in some of the

other constitutions declaring complete equality of civil rights, privileges and capacities are sufficiently broad to accomplish the same purpose. *Perry v. Com.* 3 Gratt. 632. In Michigan and Oregon a witness is not to be questioned concerning his religious belief. See *People v. Jenness*, 5 Mich. 305. In Georgia the Code provides that religious belief shall only go to the credit of a witness, and it has been held inadmissible to inquire of a witness whether he believed in Christ as the Saviour. *Donkle v. Kohn*, 44 Ga. 266. In Maryland no one is incompetent as a witness or juror provided he believes in the existence of God, and that, under his dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come. Const. Dec. of Rights, § 36.

By statutory enactment in the State of New York, a person believing in a religion other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion. N. Y. Code Civ. Proc. § 849. And a previous section (847) of the same Act allows of a solemn declaration or affirmation. This is administered to any person who declares that he has conscientious scruples against taking an oath or swearing in any form.

The formula prescribed by legislative sanction, in New York, is simply—"you do solemnly, sincerely, and truly declare and affirm." This is a very felicitous evasion of the embarrassments that invest this subject, as there is no difference in legal effect between an oath and an affirmation. *Pendergrast's Case*, 3 City Hall Recorder, 11.

A Jew or Israelite is usually sworn upon the Hebrew Bible, and with his head covered. *People v. Jackson*, 3 Park. Crim. Rep. 590. As to the mode of administering oaths to Chinese, see *Fryatt v. Lindo*, 3 Edw. Ch. 239, 6 L. ed. 641.

Although as the law now stands in those states where it has not been changed by legislation, want of religious belief operates as a positive disqualification to the extent stated in the text, it is not by any means in a satisfactory state upon this point. While on the one hand, there is no doubt but that the rule requiring all testimony in judicial proceedings to be given under the sanction of an oath gives, in the great majority of cases, a very important security for its truthfulness, for the reason, as has been said, that the generality of mankind, are "neither so virtuous as to be safely trusted in cases of importance upon their bare word, nor



yet so abandoned as to violate a more solemn engagement," and while it is also undeniable that a man who recognizes himself to be under no moral accountability to a superior being, is altogether lacking in the strongest motive for veracity, yet it would be going altogether too far to say that the testimony of such a person must necessarily be so entirely untrustworthy as to justify its being altogether excluded from consideration in judicial proceedings. Such a view is directly at variance with the whole tendency of modern legislation, both in this country and in England, upon the subject of evidence, which is towards removing the common law restrictions upon the competency of witnesses, such as having an interest in the result of the trial or having been previously convicted of an infamous crime, but allowing the fact which formerly formed the ground of such disqualification to be given in evidence to affect the witness's credibility. Upon this principle the true rule would seem to be, that want of religious belief upon the part of a witness should not exclude his testimony, but ought always to be allowed to be given in evidence to effect its credibility, and for this purpose it should be permitted to cross-examine witnesses upon the point.

**c. Early Misconception.**—The embarrassment and misconception that has surrounded the subject of this chapter in earlier days has almost entirely disappeared. A mass of adjudication touching the disqualifications of slaves has vanished with the institution of slavery. And the 14th Amendment, with the Civil Rights Bill has effectually abolished many legal refinements that have been engrafted upon the law of evidence by able jurists, who, in deference to sectional sentiment and the demands of a peculiar institution, were forced to adopt the remedy of prescription in the face of the more liberalizing tendencies of their country and the age.

**d. Effect of the Civil Rights Bill.**—Wherever the Federal law, as embodied in the celebrated Civil Rights Bill, has come in contact with the legislative enactments in the southern states, its superiority as a rule of conduct for the management of the trial court, has forced into abeyance the peculiar system previously in vogue, within the territorial limits of the State.

We find instructive reading in *Kelley v. State*, 25 Ark. 393; *Clarke v. State*, 35 Ga. 75; *Ex parte Warren*, 31 Tex. 143; *State v. Underwood*, 63 N. C. 98. In each of these cases, the principle

embodied in the Civil Rights Bill receives juridical endorsement and vindication. Indeed, it may be affirmed that social disqualification as a bar to the privileges of the witness stand, has utterly disappeared in this country. It never obtained except in reference to Indians, Negroes and Chinamen. As regards both the former, appropriate legislation has removed the ban, and for several years the incompetency of the Indian has been made to depend upon his capacity to understand and feel the obligation of an oath. *Priest v. State*, 10 Neb. 393.

e. **The California View as to Mongolians.**—Considerable hesitancy has characterized the utterances of the California courts upon this subject. The early prejudice and fanatical bigotry that distinguished the opposition to Chinese labor for many years imposed upon the courts of that jurisdiction a controlling sentiment of hostility and restriction. To all invasions by Mongolians, to the witness stand, the utterances of the early courts are a weltering Babel of conflicting oracles, and until 1884 there has been no settled principle regarding the matter. In that year, the United States District Court laid down the law regulating the admission of Chinese to the witness-box, and by declaring them to be under the protection of the Constitution and laws of the Federal Government which guarantees to them an equal protection of the law, finally invested the despised Asiatic with the immunities and privileges of other witnesses. *Re Tung Yeong*, 1 West Coast Rep. 647.

### § 268. Common Law Disqualification for Infamy.

a. **“Infamy” Defined.**—The foregoing observations necessitate some correct apprehension of the term “infamy.” It seems to have eluded a precise definition. Bouvier defines it as “that state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness.”

When a man is convicted of an offense which is inconsistent with the common principles of honesty and humanity, the law considers his oath to be of no weight, and excludes his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty or property. The crimes which at common law render a person incompetent is treason; receiving stolen goods; all offenses founded on fraud, and which come within the general notion of the *crimen falsi* of the

Roman law; as perjury and forgery; piracy, swindling and cheating, barratry and conspiracy, and the bribing a witness to absent himself from a trial in order to get rid of his evidence.

**b. Crime and not Punishment, Considered.**—It is the crime and not the punishment, which renders the offender unworthy of belief. 1 Phil. Ev. 25. In order to incapacitate the party, the judgment must be proved as pronounced by a court possessing competent jurisdiction. *Wicks v. Smallbrooke*, 1 Sid. 51; *Rex v. Smith*, 2 Stark. 183; Stark. Ev. pt. 2, 144, *note 1*, pt. 4, p. 716. But it has been held that a conviction of an infamous crime in another country or another of the United States, does not render the witness incompetent on the ground of infamy. Though this doctrine appears to be at variance with the opinions entertained by foreign jurists, who maintain that the state or conditions of a person, in the place of his domicile accompanies him everywhere. Story, Conf. Laws, 620, and the authorities there cited.

Conviction without judgment works no disability. Bull. N. P. 392.

As we have seen, the objection to competency may be answered by proof of pardon, and by proof of reversal by writ of error, which must be proved by the production of the record. A pardon granted after the sentence of the court has been complied with restores competency. *Gest v. Way*, 2 Whart. 451. A pardon before conviction is equally operative (*Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366); without pardon, infamy remains. *State v. Benoit*, 16 La. Ann. 273.

**c. Scope of the Enabling Statutes.**—Much of the early learning that displayed itself upon this topic has been rendered useless by the liberalizing tendency of the modern law regarding the competency of the witnesses. Enabling statutes in every State of the American Union have been passed under the provisions of which the principles and salient features of *Lord Denman's Act* (6 and 7 Vict. chap. 85), which abolish generally the disqualification of interest, and was the direct precursor of more radical reforms have been preserved and in many instances elaborated. The celebrated Act referred to did not render competent (1) any party to any suit, act or proceeding, individually named in the record, except (subject to all just exceptions) a defendant in equity; (2) any lessor of the plaintiff in ejectment; (3) any tenant of the premises sought to be recovered in ejectment; (4) the landlord or

any other person whose right any defendant in replevin may make cognizant; (5) any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part; and (6) the husband or wife of any such person respectively. The first proviso above noted was repealed subject to certain specified exceptions, by 14 and 15 Vict. chap. 99, §§ 1, 2, and by 16 and 17 Vict. chap. 83, husbands and wives are rendered competent except in cases involving adultery or the disclosure of confidential communications.

Congressional recognition of *Lord Denman's Act* was taken in 1864, and the Statutes at Large provided "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in the issue tried." A subsequent statute passed by the same Congress added the following proviso, "that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party or required to testify thereto by the court. Both of these provisions are now incorporated in U. S. Rev. Stat. (2d ed.) §28.

As early as the passage of the Judiciary Act, a witness competent under the state laws, was also competent in suits at law in the United States courts (*Vance v. Campbell*, 66 U. S. 1 Black, 427, 17 L. ed. 168; *Haussknecht v. Claypool*, 66 U. S. 1 Black, 431, 17 L. ed. 172), and such has been the rule ever since. But this rule has been held not to apply to criminal cases, (*Segee v. Thomas*, 3 Blatchf. 11; *United States v. Hawthorne*, 1 Dill. 422), or to suits in equity, (*Segee v. Thomas*, *supra*), though the latter distinction as taken is not easily seen.

By special enactments parties claimant or defendants in the Court of Claims are incompetent to support their claims and defenses (Act of June 25, 1868, 25 Stat at L. chap. 71; Rev. Stat. § 1079; *Hubbell's Case*, 4 Ct. Cl. 37); but it has been held that the United States could use a witness to defeat the claim, whose interest was adverse to the claimant, although judgment against the claimant might establish his own right to the same claim. *Bradley v. United States*, 104 U. S. 442, 26 L. ed. 824.

d. **Lord Mansfield's Rule.**—*Lord Mansfield* lays down the rule that a conviction on the charge of perjury is not sufficient if

not followed by a judgment. "I know of no case," he says, "where a conviction alone has been an objection, because upon motion on arrest of judgment, it may have been or may be quashed."

But on the other hand a case from Keble is cited as authority in Loffts' edition of an old text-book of repute (1 *Ch. Baron Gilbert's Law of Evidence*, 261). He thus states the rule: "An indictment for perjury, and verdict thereon, and no judgment entered, cannot be admitted to weaken the credit of any witness; for if there be no judgment entered, the *allegata* must be supposed defective, and a man cannot be intended to make competent proof upon insufficient *allegata*."

A kindred rule is, that a plea of *autrefois convict* can be proved only by the record; and the indictment with the finding of the jury, etc., indorsed by the proper officer is not sufficient, although it appears that no record has been made up. *Rex v. Bowman*, 6 Car. & P. 99. This is not a *nisi prius* decision, but has the authority of the Court of King's Bench. But there is authority of a later date than some of those cited, and nearer home. In *Skinner v. Perot*, 1 Ashm. 57, the rule is recognized that a conviction without an attainder does not destroy the competency of the witness. See also *Cushman v. Loker*, 2 Mass. 108. *People v. Herrick*, 13 Johns. 82, is always considered an authority on this point. *People v. Whipple*, 9 Cow. 707, is express; so is *Dawley v. State*, 4 Ind. 128.

**e. Conflict in Judicial Dicta.**—There is great conflict in the judicial dicta as regards the extent to which conviction in another State of an infamous offense shall disqualify the party convicted as a witness. Story, Conf. L., §§ 91, 93, 104, 620, 625.

In *Chase v. Blodgett*, 10 N. H. 24, and *State v. Candler*, 3 Hawks, 393, it was held that one convicted in another State of an offence, conviction of which rendered him incompetent in the State where convicted, and would have had the same effect in the State where he was offered as a witness had he been convicted there, was also disqualified in the latter State, but in *Com. v. Green*, 17 Mass. 515, the contrary was held. The case last referred to rests upon the ground that the disqualification is in the nature of an additional penalty, following and resulting from the conviction, and cannot extend beyond the territorial limits of the State where the judgment was pronounced. That the constitutional provision requiring that full faith and credit be given to the records, etc., of other states does not require that the same effect

be given to them as in the State where rendered, as it was left to Congress to prescribe their effect, and also that this constitutional provision does not apply, and is not in its nature applicable to criminal proceedings. *Sims v. Sims*, 75 N. Y. 466.

In 1887, Pennsylvania, by a legislative enactment limited the exclusion of witness on the ground of infamy to convictions of perjury or subornations of perjury, and no disqualification attends a conviction of assault and battery with intent to kill. *United States v. Brocius*, 3 Wash. C. C. 99.

### § 269. Questions Having Tendency to Disgrace Witness.

a. **Want of Harmony of Authorities.**—Whether a witness is compellable to answer questions having a tendency to disgrace him; as, for instance, whether he was ever convicted of an offense, or had suffered some infamous punishment or been in jail on a criminal charge, is a great question in our books, and one on which an attempt to reconcile the authorities would be perfectly hopeless. It is indeed settled that he must answer if the question is relevant to the issue in the cause; the doubt is, when it relates to collateral matters and is only put in order to test his credit. The arguments, pro and con, are thus stated in a work of authority: “There seem to be no reported cases in which this point has been solemnly determined; and in the absence of all express authority, opinions have been much divided. The advocates for a compulsory power in cross-examination might argue, that as parties are frequently surprised by the appearance of a witness unknown to them, or if known, entirely unexpected, without such power they would have no adequate means of ascertaining what credit is due to his testimony; that on the cross-examination of spies, informers, accomplices, this power is more particularly necessary; and that if a witness may not be questioned as to his character at the moment of trial, the property and even the life of a party must often be endangered.” Best, Ev. § 130.

This is plausibly urged, but is substantially answered by a parliamentary Act, which provides that “a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or expose him to penalty or forfeiture of any nature whatsoever by reason only, or on the sole ground that the answering of such question may tend to establish that he owes a debt, or is otherwise subject to a civil suit.

We may add that by statute adopted in England and in most of the United States, the disqualification of infamy is removed, but a conviction may be proved to effect credibility. It is the crime and not the punishment which renders the offender unworthy of belief, and no disability will follow a conviction, without judgment pronounced. Bouvier, Law Dict. *title* "Infamy."

b. **The Present Theory.**—The settled theory in regard to the competency of witnesses now is that the court or jury should have all possible light thrown upon the facts, and judge for itself what credence to give to the evidence offered. The exclusion of felons as witnesses has been justified by the argument (1) that their testimony is wholly unreliable and unsafe, and (2) that it is a proper punishment for their crimes. Upon neither theory can it be justified. There is no more reason to apprehend that persons who have been convicted of felony, will, as a class, be guilty of willful perjury, especially in a matter in which they have no interest, than there is to apprehend the same consequences from an admission from many other classes of persons who are now competent witnesses; and not so much as in the case of persons from whom the disability has recently been removed. The idea that the disqualification is a proper punishment for crime is even more illogical. It tends, indeed, to disgrace the criminal; but in most cases the weight of the punishment falls, not upon him, but upon the innocent party who happens to be in a position to need his testimony. It has been held that the defendant in an indictment is a competent witness in his own behalf, notwithstanding that he has served out a term in the state prison, upon a former conviction of felony. *Delamater v. People*, 5 Alb. L. J. 122. Now that interested persons, parties, and their wives or husbands, and even persons charged with crime, are competent witnesses, consistency seems to demand that the only remaining disability should be swept away. It was swept away in England in 1843 by Lord Denman's Act, together with the disqualification on the ground of interest; although a subsequent statute creates an exception which prevents a person accused of crime from testifying in his own behalf upon a trial. See 6 and 7 Vict. chap. 85; 14 and 15 Vict. chap. 99, §§ 2 and 3. The reform has been cordially approved of by the subsequent text-writers. See Taylor, Ev. (6th ed.) 1165, 1171, 1177.

The provisions of the United States Constitution, declaring that full faith and credit shall be given to the record of other states (U. S. Const. art. 4, § 1), does not require that personal disabilities

imposed upon a person convicted of crime in one State, should follow him and be enforced in other states.

The weight of modern opinion seems to be that personal disqualifications arising not from the laws of nature, but from positive law, especially such as are of a penal nature, are strictly territorial and cannot be enforced in any country other than that in which they originated. Story, Conf. L. §§ 94-104.

If such were the operation of the Constitution, the qualifications of witnesses called in our courts and of voters at our elections might be made to depend upon the laws of other states instead of our own. In the New Hampshire and North Carolina cases referred to (*Chase v. Blodgett*, 10 N. H. 22, and *State v. Candler*, 3 Hawks, 393) this argument is met by the contention that it is the crime and not the judgment which incapacitates the witness, and that the incapacity is not prescribed as a punishment for the crime, but because by the commission of it the criminal has shown himself a person unfit to be trusted to give testimony affecting the rights of others. *Sims v. Sims*, 75 N. Y. 466.

**c. The Attitude of Judicial Decision.**—The present attitude of judicial decision in this country upon this topic of disqualification through crime may be crystalized and formulated in manner following:—A person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any questions relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question. *Milsap v. Stone*, 2 Colo. 137.

The word "convicted," as employed in the above connection, is construed to mean the final judgment of the court in passing sentence. *Sacia v. Decker*, 1 N. Y. Civ. Proc. Rep. 47.

## § 270. Insanity as a Disqualification.

**a. Views of Medical Jurisprudence.**—In medical jurisprudence insanity is the prolonged departure without any adequate cause from the states of feeling and the modes of thinking usual to the individual in health.

In late years this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms lunacy, idiocy and unsoundness of mind. Even to the middle of



the last century the law recognized only two classes of persons requiring its protection on the source of mental disorder, viz: lunatics and idiots. The former were supposed to embrace all who had lost the reason which they once possessed, and their disorder was called, *dementia accidentalis*; the latter, those who had never possessed any reason, and this deficiency was called *dementia naturalis*. Lunatics were supposed to be much influenced by the moon, and another prevalent notion respecting them was, that in a very large proportion there occurred lucid intervals when reason shone out for a while from behind the cloud which obscured it, with its natural brightness.

It may be remarked in passing, that lucid intervals are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the old writers would lead us to infer. In modern practice the term "lucid interval" signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm; and the proof of its occurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine lucid interval that does occasionally occur. Bouvier, Law Dict. title "Insanity."

The law presumes the sanity of everyone, and his consequent power to bind himself by contract, on the absence of proof to the contrary, that being the actual condition of a majority of mankind. Every person is therefore justified in dealing with others as being of sound mind, until he has some notice of their insanity, or some evidence to put him upon inquiry. But every one is bound to take notice that a person is insane, after he has been found to be so by inquisition for that purpose, and placed under guardianship.

Sanity and intellectual capacity being the rule, with comparatively few exceptions, the presumption must prevail until rebutted, that all acts performed by adult persons are binding, and the evidence to overcome this presumption must be clear and satisfactory. *McCarthy v. Kearnan*, 86 Ill. 291, 295.

The term "*non compos mentis*" is used as a general name, applicable to all persons of unsound mind. Co. Litt. 246 b, 247 a; *Doud v. Hall*, 8 Allen, 410; *Jackson v. King*, 4 Cow. 207; *Odell v. Buck*, 21 Wend. 142; *Maddox v. Simmons*, 31 Ga. 512; *Burnham v. Mitchell*, 34 Wis. 117. It therefore includes idiots as well as lunatics. An idiot, in the common acceptation of the term, is a

natural fool "who hath had no understanding from his nativity, and who is therefore presumed by law to be never likely to attain any." Chitty, Cont. 135. A person may, however, become as devoid of understanding by accident or sickness as one who was born to that condition. Idiocy is not a mere weakness of mind, but a deficiency thereof; not necessarily entire, but such as to render the person affected with it incapable of understanding and acting in the ordinary affairs of life, or in the particular contract as to which the question arises.

b. **"Lunatic" Defined.**—A lunatic, on the other hand, is one who has understanding, but by disease or grief or other accident, has lost the use of his reason. The term "insanity" covers every degree of unsoundness of mind and derangement of intellect, short of idiocy. The only test of legal insanity, as affecting capacity to make a will, is held to be delusion, hallucination, a belief of facts which no rational person would believe. *Re Forman's Will*, 54 Barb. 274, 1 Tuck. 205.

c. **Distinction Between Weakness of Mind and Insanity.**—It is difficult precisely to define insanity, or to discriminate between it and mere weakness of mind, or disturbed imagination. Sanity itself is susceptible of division into degrees, and absolute insanity may or may not be predicated of any person according as we include therein more or less power of thought or accuracy of judgment. Insanity upon some one or more subjects may co-exist with apparently perfect sanity on all others. It is frequently also of an intermittent character, periods of insanity being followed by lucid intervals, in which the person affected seems to enjoy his senses as perfectly as those who have never been insane.

d. **Presumption of Continuance of.**—Habitual unsoundness, once shown to exist, will be presumed to continue until the contrary is established (*State v. Reddick*, 7 Kan. 143; *Carpenter v. Carpenter*, 8 Bush, 283); but there is no presumption that a temporary hallucination continues, since that would necessarily conflict with and overcome the superior presumption of sanity. *Hall v. Unger*, 2 Abb. (U. S.) 507; *Staples v. Wellington*, 58 Me. 453. The effect of these presumptions is to cast the burden of proof of insanity, in the first instance, upon the party asserting it, but proof that it has previously existed in a permanent form has the

effect to change the rule, and require the other party to prove that the contract sought to be established was made during a lucid interval. And, for that purpose, he must show that the party sought to be charged had memory and judgment enough to understand the character of his act, and the legal responsibility flowing therefrom. *Atty-Gen. v. Parnther*, 3 Bro. Ch. 369; *Noel v. Karper*, 53 Pa. 97; *Goodell v. Harrington*, 3 Thomp. & C. 345; *Hicks v. Marshall*, 8 Hun, 327.

Insanity generates disqualification only when it results in the total obliteration of the reasoning or memorizing faculties. A lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matter, which he has seen or heard in reference to the questions at issue.

**e. Lunatic Allowed to Testify When.**—Whether a lunatic or insane person has sufficient understanding to be admissible as a witness, is a question to be determined by the court upon examination of the party himself, and of any competent witnesses who can speak to the nature and extent of his insanity. It is for the jury to decide what amount of credit they will give to his testimony. *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618.

**f. Confusion of Authority.**—Various authorities have been referred to which lay down the law that a person *non compos mentis* is not an admissible witness; but in what sense is the term "*non compos mentis*" employed? If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evidence upon the subject matter under consideration. The proper test must always be: Does the lunatic understand what he is saying; and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he is; still if he can stand the test proposed, the jury must determine all the rest. It frequently happens in a lunatic asylum the patients are the only witnesses of outrages upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information are not to be heard.

**g. Conclusion of the English Jurists.**—*Baron Alderson, Justice Coleridge, Baron Platt and Justice Talfour* agreed with *Chief Justice Campbell, Justice Talfour* observing that if the proposition that a person suffering under an insane delusion cannot be a witness, were maintained to the fullest extent, every man subject to the most innocent, unreal fancy would be excluded. *Martin Luther* believed that he had a personal conflict with the devil. *Dr. Johnson* was persuaded that he heard his mother speak to him after death. In every case the judge must determine according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences. This case is also found in 2 *Denison and Pearce's Crown Cases*, 254, where *Lord Campbell* is reported to have said that the rule contended for would have excluded the testimony of *Socrates*, for he had one spirit always prompting him.

**h. The Controlling Inquiry.**—The controlling inquiry as to whether a proposed witness is under the disqualification of insanity, and hence incompetent as a source of evidence, has engrossed the attention of the *Connecticut Supreme Court*, and its conclusion is that a witness sane at the time he testifies, but insane at the time of the transaction, with regard to which he testifies, is a competent witness. His credibility only, is in question, and of this, it is the sole province of the jury to decide. *Holcomb v. Holcomb*, 28 Conn. 177. And other well considered decisions hold, that one who has been adjudged restored to sanity may testify as to facts that occurred while he was under guardianship as insane. *Sarbach v. Jones*, 20 Kan. 498. Compare *Endel v. Walls*, 16 Fla. 786.

The burden of proof as to restoration to sanity rests upon the party offering the witness. Thus an inquisition of lunacy found against one is prima facie evidence of his incompetency, and unless it be overcome by evidence of his sanity, he should not be permitted to testify, even against one not a party to the proceedings in lunacy (*Hoyt v. Ade*, 3 Lans. 173; *Armstrong v. Timmons*, 3 Harr. (Del.) 342); but the fact of insanity must, in the first instance, be proved by the party objecting to the witness. *State v. Holloway*, 8 Blackf. 45.

As respects the competency of persons affected with monomania, *i. e.* unsoundness of mind upon one particular subject (not a

part of the matter in issue), Roscoe advises the exclusion of their testimony (Roscoe, *Crim. Ev.* 128). Best, however, calls this "hard measure" (Best, *Ev.* 168), and the Privy Council of England have said that if the mind is unsound on one subject, and this unsoundness at all times exists upon that subject, the mind of the person cannot properly be considered really sound upon other subjects. *Waring v. Waring*, 12 Jur. 947; *Reg. v. Hill*, 15 Jur. 470, 5 Eng. L. & Eq. 547, 5 Cox C. C. 259.

An inquisition of lunacy found against a person is *prima facie* evidence of his incompetency, unless overcome by evidence of sanity. *Hoyt v. Ade*, 3 Lans. 173. And it must be borne in mind in this connection, that the law presumes a fact continuous in its character, still continues to exist, until a change is shown, as a partnership, or within certain limits, that a life continues. *Innis v. Campbell*, 1 Rawle, 373.

It is no objection to the competency or credibility of a witness, that he is subject to fits of derangement, if he is sane at the time of giving his testimony. *Evans v. Hettich*, 20 U. S. 7 Wheat. 453, 5 L. ed. 496.

### § 271. Incompetency Relieved by Executive Pardon.

a. **Alexander Hamilton on the Pardoning Power.**—Mr. Hamilton, in *The Federalist*, No. 74, speaking of the President's pardoning power, says: "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little fettered as embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, Justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always the strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives that might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance."

He then proceeds to show that while there are objections to giving the President the power to pardon the crime of treason, so also there are reasons in favor of it, which outweigh the objections. He says: "In seasons of insurrection or rebellion there are often critical moments when a well timed pardon to the insurgents or rebels may restore the tranquillity of the Com-

monwealth, and which if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature or one of its branches for the purpose of obtaining its sanction, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day or an hour, may sometimes be fatal. The people understandingly and of purpose clothed the President with the power to pardon treason."

**b. Effect of its Legitimate Exercise.**—Marshall, *Ch. J.*, in *United States v. Wilson*, 32 U. S. 7 Pet. 150, 8 L. ed. 640, speaking of the pardoning power, says: "As this power has been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bears a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

The Constitution vests in the President the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.

This language is clear and explicit, and cannot admit a doubt as to its meaning. This is a power belonging to the Executive; not to be controlled or limited by Congress. If the President can pardon, subject to the exceptions and qualifications that Congress may impose, this prerogative has gone from him, and he depends to this extent upon the will, wish or caprice of Congress.

**c. Views of Mr. Justice Story.**—Story, in his Commentaries on the Constitution (§ 1498), says that humanity and sound policy dictate that this prerogative should be fettered as little as possible; and except in cases of impeachment, contempt, etc., the power to pardon is unqualified, and reaches from the highest to the lowest offenses. And again; he declares that no law can abridge the constitutional powers of the President to pardon. §§ 1503, 1504.

**d. Of United States Supreme Court.**—*Mr. Justice Field* has expressed the sentiments of the United States Supreme Court in the following language: "The Constitution provides that the President shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment. art. 2, § 2." *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366.

**e. The Power Unlimited in its Scope.**—The power thus conferred is unlimited with the exception stated. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366.

The rule is a general one that a pardon regularly granted removes the disability of the witness (*United States v. Rutherford*, 2 Cranch, C. C. 528); but the Illinois Supreme Court has held that where the disability is annexed as an incident of the conviction, executive clemency in the way of pardon does not affect the disability. *Foreman v. Baldwin*, 24 Ill. 298.

A well considered West Virginia case holds that where a convict has undergone the punishment of imprisonment in the penitentiary under his sentence, the Statute restores to him competency as a witness, and the fact of his being at liberty after the length of time for which he was sentenced, is prima facie evidence that he has suffered the punishment. *State v. Williams*, 14 W. Va. 851. *Contra*, *United States v. Brown*, 4 Cranch, C. C. 607.

Where a sentence has been suspended pending an appeal, the convicted party is still under the disabilities imposed by statutes. *Ritter v. Democratic Press Co.* 68 Mo. 458.

The Texas courts refuse to recognize the competency of a witness who has been convicted and fined and has failed to pay the fine. While the delinquency of the convicted person continues, the court refuses to allow him to be sworn. *Ellege v. State*, 24 Tex. 78.

## § 271. The Oath of Witnesses.

**a. All Witnesses must be Sworn.**—The wisdom of requiring witnesses to be sworn, excepting under very special circumstances, cannot well be disputed; the ordinary definition of an oath is "a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of heaven, if he does not speak the truth." *Rex v. White*, 1 Leach, 430. The *Queen's Case*, 2 Brod. & B. 285, may be open to comment, since the design of the oath is not to call the attention of man to God;—not to call upon him

to punish the wrong doer, but to admonish the witness that he will assuredly do so;—still, it must be admitted, that by thus laying hold of the conscience of the witness, the law best insures the utterance of truth. Tyler, Oaths, 12–15. See *Omychund v. Barker*, 1 Atk. 21.

But as the administration of an oath supposes that the witness feels a moral and religious accountability to a Supreme Being, who will justly punish perjury, and from whom no secrets are hid, persons insensible to the obligation of an oath ought not to be sworn. The repetition of the words of an oath would, in their case, be an unmeaning formality. The question, however, still remains, should such persons be allowed to give testimony in courts of justice? and to this question, while the common law pronounces a negative (Bull. N. P. 292; *Omychund v. Barker*, 1 Atk. 40, 45; *Maden v. Catanach*, 7 Hurlst. & N. 360, 31 L. J. Exch. 118), the Legislatures of the respective states have declared for qualification and provide a form of affirmation which was an utter stranger to the canons of common or civil law.

**b. Ancient Mode of Administering Oath.**—The ancient mode of administering an oath by the person who swears laying his hand upon and kissing the gospel, is still observed, and an oath irregularly administered in this manner, *e. g.* upon a book other than the Holy Evangelists, the parties administering it and taking it supposing it a Bible, is a valid oath. *People v. Cook*, 8 N. Y. 67. If the party taking it makes no objection to the mode of administering it at the time, he is deemed to have assented to the particular form adopted, and is liable to all the consequences of perjury, as if it had been administered in strict conformity to the statutes. *Cady v. Norton*, 14 Pick. 236.

Another form allows the kissing of the gospels to be dispensed with, and the following formula in lieu thereof: “You do swear in the presence of the ever-living God;” while so swearing he may or may not hold up his hand at his option.

An oath is a declaration made according to law before a competent tribunal or officer to tell the truth; or it is the act of one who, when lawfully required to tell the truth, takes God to witness what he says is true. It is a religious act, by which the party invokes God, not only to witness the truth and sincerity of his promise, but also to avenge his imposture of violated faith, or, in other words, to punish his perjury if he should be guilty of it. Bouv. Law. Dict. *title* “Oaths;” 1 Stark. Ev. 23. See 1 Greenl.



Ev. § 328, where a somewhat different definition of an oath has been given.

By a later definition, an oath has been briefly defined an "an outward pledge, given by the juror" (or person taking it) "that his attestation or promise is made under an immediate sense of his responsibility to God." Tyler, Oaths, 12-13.

**c. Rule Prescribed by Illinois Statute.**—The Statute of Illinois provides that "whenever any person shall be required to take an oath before he enters upon the discharge of any office, place or business, or on any other lawful occasion, it shall be lawful for any person empowered to administer the oath to administer it in the following form, to wit: "The person swearing shall, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospel." Rev. Stat. 725, § 3.

Swearing the witness by the uplifted hand is held to be a legal swearing independent of the statutes. *Gill v. Caldwell*, 1 Ill. 28; *McKinney v. People*, 7 Ill. 540.

The oath must be administered in the form and manner recognized by the witness as obligatory upon his conscience according to the form used in the country, and under the religion of his spiritual faith. *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 552; Phil. Ev. 20.

It is also provided that, "whenever any person required to take or subscribe an oath, as aforesaid, and in all cases where an oath is upon any lawful occasion to be administered, and such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to wit: "You do solemnly, sincerely and truly declare and affirm." Which solemn affirmation or declaration shall be equally valid as if such person had taken the oath in the usual form; and every person guilty of falsely or corruptly declaring, as aforesaid, shall incur and suffer the like pains and penalties as were or shall be inflicted on persons convicted of willful and corrupt perjury. Rev. Stat. 725, § 4; Haines, Treatise, (12 ed.) 544.

The legal effect of an affirmation is the same as that of an oath. *Pendegrast's Case*, 3 City Hall Recorder, 11.

**d. Who May Administer.**—When a statute does not designate the particular officer by whom a required oath may be adminis-

tered and certified, it may be taken before any officer having general authority to administer and certify oaths. *Dunn v. Ketchum*, 38 Cal. 93.

The oath must be administered in the form and manner recognized by the witness as obligatory upon his conscience, according to the form used in the country and under the religion of his spiritual faith. *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 552; Phil. Ev. 20; Tyler, Oaths, 12, 13.

Now the degree of religious faith, which is presumed capable of binding the conscience of a witness to speak the truth, and which consequently will render him competent to take an oath, seems, as at present understood, to be a belief in the existence of God, and in fact that divine punishment will be the certain consequence of perjury. It matters not whether or not the witness believes that the punishment will be inflicted in this world, or in the next. It is enough if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath. In *Omychund v. Barker*, Willes, 538, 545, 1 Atk. 21, 1 Smith, Lead Cas. (5th Am. ed.) 535, the proper test of the competency of a witness to be sworn was settled, upon great consideration, to be the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognized in *Butts v. Startwood*, 2 Cow. 431; *People v. Matteson*, 2 Cow. 433, 573, note; and by Story, J., in *Wakefield v. Ross*, 5 Mason, 18; 9 Dane Abr. 317. See also, as to the Scottish Law, 2 Dickinson, Ev. 849.

The law presumes that every man brought up in a Christian land believes in God and fears him. The charity of its judgment is extended to all alike. The burden is not on the party producing the witness, to prove that he is a believer; but on the objecting party, to prove that he is not. Neither does the law presume that any man is a hypocrite, but it presumes that he is what he professes to be, whether atheist or believer; and whatever religious opinions he is proved to have once entertained, they are presumed to have continued, unless a long interval has elapsed. In *Atty-Gen. v. Bradlaugh*, L. R. 14 Q. B. Div. 667, per Lord Coleridge, commenting on the above passage, June 30, 1884, says: "Religious belief once shown is presumed to continue unchanged until the contrary is shown." See *State v. Stinson*, 17 Me. 154.

One mode, and perhaps the one least objectionable, of proving that a witness is incompetent to take an oath on the ground of want of religious belief, is by furnishing evidence of his atheistic

declarations previously made to others (see 1 Law Reporter, 347, 348, as to the American Law; and see 2 Dickinson, Ev. 849, 850, 907, as to the Scottish Law); but the witness may himself be interrogated upon the subject, either before he is sworn at all, or after he has been sworn upon the *voir dire* (*Rex v. Taylor*, Peake, 11, *per Buller, J.*; *The Queen's Case*, 2 Brod. & B. 284) or even, as it would seem, after having been sworn in the cause. *Rex v. White*, 1 Leach, 430; *Maden v. Catanach*, 31 L. J. Exch. 118, 7 Hurlst. & N. 360.

**e. When Affirmation May be Made.**—A solemn declaration or affirmation in the following form is sometimes used in favor of a person who declares that he has conscientious scruples against taking an oath, or swearing in any form. "You do solemnly, sincerely and truly declare and affirm."

**f. Other Modes of Swearing.**—If the court or officer, before which or whom a person is offered as a witness, is satisfied that any particular mode of swearing, in lieu of, or in addition to laying the hand on and kissing the gospels, is, in his opinion more solemn and obligatory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness.

A person believing in a religion other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion.

**g. When Court May Examine Witness.**—The court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

A person swearing, affirming or declaring in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he could be guilty of the same crime, if he had sworn by laying his hand upon and kissing the gospels.

**h. Fryatt v. Lindo and Note.**—Especially suggestive in this connection is a monographic note of exceptional merit appended to the case *Fryatt v. Lindo*, 3 Edw. Ch. 239, 6 L. ed. 641. The exposition indicates the correct method of impressing the solemnities of an oath upon the conscience of a Jewish witness, and also the ceremony adopted by the New York Marine Court, in swearing a Celestial. We subjoin the note entire:

“The reporter showed the text to three intelligent Jews; and they severally wrote to him as follows: This mode was practiced when the Jews were a nation and subject to their own laws and judges. The sacrifices they were bound to make were only performed during the existence of the temple. We have no priests now, only readers. Our peculiar laws not only require us to pray for the peace of the country protecting us, but enjoin upon us to be faithful and observe the laws of that country. Any form of oath that is directed by those laws is binding on us, as much as if taken under the ancient law; and even if it be necessary to have the deposition of a Jew in respect to the affairs of the synagogue, before the authorities of the country, it is taken according to the laws of the latter. The commandment to us is, ‘Thou shalt not take the name of the Lord thy God in vain.’ Any addition to this is merely rabbinical or local, changing at different periods, according to the laws of the country in which we may happen to reside. When the mode referred to in the text was adopted, of swearing on a manuscript of the Pentateuch on parchment, the art of printing was not known; so that there were no Bibles as there are at the present day. And now it would not be permitted to take one of the copies out of our synagogues for the purpose of administering an oath in a case between man and man.

“Among the Jews, oaths are very much discouraged. Those living in countries, the manners and customs of which they have not adopted, regard an oath with dread. There are many who, in controversial suits, will rather lose their cause, and even reduce themselves to beggary, than take an oath.

“It is said in the Bible, ‘The Lord thy God thou shalt fear, and by His name thou shalt swear.’ This constitutes the oath of an Israelite. The commentators and jurists, however, in order to avoid such solemn oath, have classified cases and kinds of oaths to be taken in different circumstances. As far as my observation goes, the practice of the Jewish courts of justice, in countries where such courts are allowed them, is to require no oath from witnesses, either in criminal or controversial suits, whether both parties are Israelites, or one of them happens to be a Gentile. For the commandment is clear, ‘Thou shalt not bear false witness against thy neighbor;’ and it is believed that, if an individual will violate this commandment, his oath will not be binding. A judge

may indeed exhort a party suspected, but I have never witnessed this practice.

"In controversial cases the defendant is obliged to take an oath in disclaiming any charge made against him by the plaintiff except only when an account sued for is substantiated by the books of the plaintiff; in which case the latter is allowed to swear that his books have been regularly kept. The oaths, according to the rabbis, are different; First, is the *Herem*, or curse; second, is the Bible, or any book considered holy; third, the scroll of the law of the synagogue.

"When the judge pronounces his opinion that one or other of the parties must swear, to substantiate what he says, the party may take hold on anything that happens to be before him, a blank book, a piece of wood, or any object of the creation, and swear by it, and the oath will be considered valid in most cases, unless the opposite party, before such oath is taken, declares that he will consider no oath valid, except it be such as is prescribed by the rabbis.

"In the countries, however, where the Jews have assimilated with the Christians, oaths taken in the courts of justice, in the ordinary way, are to all intents and purposes valid.

"The conscience of the Jew is, according to all the principles of their religion, as much bound by a declaration to speak the truth as by any form or ceremonial observances; and our writers teach that, in the view of the Creator, the sin and punishment of falsehood are the same in either instance. *Ex. chap. 23, v. 1; Maimonides, vol. 3; Hilchoth Shebuoth, Modes of Swearing, chap. 2, v. 2; Moshem Mishpot, Breastplate of Judgment, chap. 87, 19 v.*

"The origin of symbolic or ceremonial oaths is traceable to the time of our patriarch Abraham, who made Eleazer of Damascus swear, putting his hand under his thigh. *Gen. chap. 24, v. 2.* This oath was taken by the then only outward emblem of the faith of the future nation, namely, circumcision. Yarchi, on the above verse. In subsequent times the oaths of men of religious and good character were not required, their declarations being received. When, however, one was brought to testify, whose character was unknown or whose testimony was suspected, the judges, before receiving his testimony, were required to advise him of the sin of false swearing and its certain punishment, and then to receive

his oath with the formalities attending it set forth in the complainant's bill.

"At a later period this form was changed, and the printed Pentateuch containing the ten commandments has alone and ever since been used. Moshem Mishpot, chap. 87, v. 19.

"Our laws strongly discountenance the taking of oaths, and on all occasions seek to avoid their requirement, and enjoin the utterance of the truth at all times."

It may not be uninteresting to add here (although it is true, it relates to an idolater's oath) the circumstances attending the examination of a Chinese in the Marine Court of the City of New York, Dec. 5, 1839, as a witness. It was in a suit before *Judge Schiefflin* in the marine court; and a young man, about seventeen years old, a native of China, who could speak English tolerably well, was called by one of the parties as a witness. The opposite party objected to his evidence being received, on the ground that he was not a Christian nor believed in the existence of a God. He was then asked by the court if he believed in Christianity, and he replied in the negative. He was next asked, did he believe in a God, and he said, "I do; for there are several gods in our temples in China." The court then quoted a section of the Revised Statutes, which says that, "every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion"—and asked the witness what was the formula of an oath in China. The witness replied that a person about to give evidence first goes to one of their temples where there are idols, and that he reads, or there is read for him, a portion of the Chinese Bible, after which the witness spits on the ground, and then takes in his hand a saucer containing salt, and dashes them against the ground, by doing which the saucer is broken in pieces and the salt scatters along the floor. When this has been done, the witness then goes before a Mandarin and gives his evidence. The court then asked the witness by whom had the book been written which he called the Chinese Bible, or whether it was supposed to have been the work of Confucius. To this the witness replied that he had never heard of such a person, nor could he tell by whom the book had been written, nor did he know anything more about it except that it was the sacred book of the Chinese, and the only English word that he was acquainted with, which conveyed his idea of it, was the word "Bible." On hearing this the judge said that he could not see how the statute

could be complied with, which enacted that a witness should be sworn according to the peculiar ceremonies of his religion. It was true that the court might for the purpose be considered a temple, as it was called the temple of justice, and the ceremonies of spitting on the ground and throwing down a saucer with salt in it might also be performed; but then there were no idols in the court, nor could the judge tell what was the name or nature of the book which the witness called his Bible. Under all the circumstances of the case, *Judge Schiefflin* therefore determined to make no decision as to whether the witness could be sworn at all, or his evidence received, until he further considered the question and consulted with the other judges of the court.

Aryouk, the Chinese witness, attended a court on the Saturday afterwards, accompanied by another native of China, who was the plaintiff. The lad Aryouk, though an intelligent youth about sixteen years old, appeared not to be so well informed in relation to the Chinese ceremony of swearing an oath as his countryman, the plaintiff, who is more advanced in years, and from whom it appeared the young man had since the day before acquired more information on the subject.

On being questioned by *Judge Scott*, he said that there were various ceremonies attending the taking of an oath in China, some of which might be dispensed with, and yet the witness considers himself equally bound to tell the truth. In addition to what he said the day before, he now mentioned that a witness sometimes holds a lighted torch in his hand, but that his omitting to do so, or to use some other ceremonies, such as spitting on the ground, are not necessary to render an oath binding and valid.

It would be sufficient, he said, to have the oath administered in the following manner, which was done accordingly. The plaintiff knelt down, and the witness took in his hand what he called the Chinese Bible, and the judge, as does the mandarin in such cases, told the witness to tell the truth. The witness then handed the Bible to the plaintiff. The witness then took a China cup in his hand, and held it while the plaintiff read aloud a small portion of the Chinese Bible. When the plaintiff stopped reading, the witness then handed him the cup, which the plaintiff dashed against the ground with much vehemence of manner and of course broke it in pieces. The witness then shut up the book, and witness and plaintiff kissed it, and the plaintiff stood up. The plaintiff then required the judge to put his (the plaintiff's) name

in that part of the Bible which he had read, which the judge did, and the witness then began to give his evidence. Prior to the oath being administered, the court had decided that, according to the Revised Statutes, the oath could be legally administered, as it was the form in which oaths were sometimes sworn in China.

The difficulty in relation to the witness being sworn in a temple was obviated by the witness stating that their Chinese courts are held in their temples, or, as he called them, churches. So that a temple and court of justice in China is one and the same thing. What is called the Bible is a small book in the form of a pamphlet containing a portion of the writings of Confucius, in the Chinese language, and having a Mandarin's signature on the cover, to attest its being a genuine copy of the work.

**i. Summary of Conclusions.**—All witnesses ought to be sworn according to the peculiar ceremonies of their own religion, or in such manner as they deem binding on their consciences. This doctrine of the civil law, which in the great case of *Omychund v. Barker*, 1 Smith Lead. Cas. 535, was settled to be also a rule at common law, has received legislative sanction in most of the American states, and it is now provided that all persons shall be bound by the oaths which are lawfully administered to them, provided they are administered to them in such form and with such ceremonies as the parties sworn declare to be binding on their consciences. In order to ascertain what form is so binding, the court should inquire of the witness himself; and the proper time for making this inquiry is before he is sworn. If, however, the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks it binding on his conscience; but if he answers in the affirmative, he cannot then be further asked, if he considers any other form of oath more binding. *The Queen's Case*, 2 Brod. & B. 284.

Neither can a witness, who states that he is a Christian, be asked any further question before he is sworn. *Reg. v. Serra*, 2 Car. & K. 56, *per* Platt, B.

§ 273. **Witness Punished for Perjury When.**—If a witness, without objection, is sworn in the usual mode, but being of a different faith, the oath is not in a form affecting his conscience,—as if, being a Jew he is sworn on the Gospels,—he is still punishable for perjury if he swears falsely, and the adverse party cannot for this cause have a new trial. *Sells v. Hoare*, 3 Brod. & B. 232, 7



Moore, 36; *State v. Whisenhurst*, 2 Hawks, 458. See *Reg. v. Wood*, Jebb & B. Append. vii. Whether a party will be entitled to a new trial, if a witness on the other side has testified without having been sworn at all, is a question, the solution of which depends upon circumstances. If the omission of the oath was known at the time of the original trial, he will not (*Birch v. Somerville*, 2 Ir. L. R. N. S. 243; *Lawrence v. Houghton*, 5 Johns. 129; *White v. Hawn*, 5 Johns. 351); but if it was not discovered till after the trial, he will. *Hawks v. Baker*, 6 Me. 72. See *Richards v. Hough*, 51 L. J. Q. B. 361.

Irrespective of the recent relaxation of the law, so far as it related to atheists, the Legislature, out of tender regard for the conscientious scruples of certain religious sects—gentlemen of the yea and nay school, who love to interpret literally our Saviour's injunction, "Swear not at all" seem utterly to ignore the fact that Christ himself not only submitted to be sworn, before the Sanhedrim, but actually refused to answer until he was put upon his oath by the high priest (see and compare Matt. 5, 34–37, and Matt. 25, 59–64), and of other persons endowed with peculiar moral susceptibilities, has allowed them in the place of taking an oath, to make a solemn affirmation. In England, since the year 1835, declarations have also, by virtue of the Act 5 & 6 Wm. IV. chap. 62, been substituted on very many occasions for the oaths, whether official or extra-judicial, or voluntary, which were formerly in use, and any person who willfully or corruptly makes and subscribes any such declaration, knowing it to be untrue in any material particular, is guilty of misdemeanor; but such affirmation has the same effect as an oath, and persons who knowingly affirm what is false, are equally guilty of perjury with those who falsely swear.

## CHAPTER XIV.

### THE EXAMINATION OF WITNESSES.

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## § 274. Preliminary Examination on the Voir Dire.

**a. Object of this Examination.**—The object of this preliminary examination is to ascertain or determine whether the witness is competent.

“When a witness is supposed to have an interest in the cause, the party against whom he is called has the choice to prove such interest by calling another witness to that fact, or he may require the witness produced to be sworn on his *voir dire* as to whether he has an interest in the cause or not; but the party against whom he is called will not be allowed to have recourse to both methods to prove the witness’s interest. If the witness answers he has no interest, he is competent, his oath being conclusive; if he swears he has an interest he will be rejected.

“Though this is the rule established beyond the power of the courts to change, it seems not very satisfactory. The witness is sworn on his *voir dire* to ascertain whether he has an interest which would qualify him, because he would be tempted to perjure himself if he testified when interested. But when he is asked whether he has such an interest, if he is dishonest and anxious to be sworn in the case, he will swear falsely he has none, and his answer being conclusive, he will be admitted as competent; if, on the contrary, he swears truly he has an interest, when he knows that will exclude him, he is told that for being thus honest he must be rejected.” Bouvier, Law Dict. *title “Voir Dire.”*

**b. By Whom Conducted.**—“Incompetency in a witness will not be presumed. It comes in the shape of an objection or exception to the witness; and if the facts on which they rest are disputed, they must, like all other collateral questions of fact, be determined by the judge; who, in cases of doubt, is always disposed to receive the witness, and let the objection go to his credibility, rather than to his competency. In many cases the ground of incompetency is apparent to the senses of the judge; as where a witness presents himself in a state of intoxication, or is an obvious lunatic, or is of such tender years that the judge deems a

preliminary inquiry into his religious knowledge essential, and the like. But the ordinary mode of ascertaining whether a witness is competent, is by examining him on what is called the *voir dire*, *i. e.*, a sort of preliminary examination by the judge in which the witness is required to speak the truth with respect to the questions put to him; when, if incompetency appears from his answers, he is rejected, and even if they are satisfactory, the judge may receive evidence to contradict them, or establish other facts showing the witness to be incompetent. It sometimes happens that the incompetency of a witness is not discovered until after he has been sworn, and his examination proceeded with a considerable way, or perhaps even brought to a close; under which circumstances, the judge ought, it seems, to erase that witness's evidence from his notes, and tell the jury to pay no attention to it. It has been said, also, that although in regular order the examination on the *voir dire* precedes the examination in chief, yet when a ground of incompetency is thus unexpectedly discovered, the judge may stop the proceedings and examine on the *voir dire* with the view of ascertaining the fact." 1 Best, Ev. § 133.

As has been previously indicated, the once complicated and sweeping rules respecting persons considered incompetent by policy of law have been wholly abrogated. There are but few survivals of what was once an intricate system. Treason, felony, or the "*crimen falsi*," especially when the punishment for those offenses was administered with mediæval rigor, were sure to furnish in every social aggregation a large class of disqualified and disfranchised persons. The ascendancy of more rational and enlightened views has placed a different aspect upon this entire subject, and the prevailing theory of the present day is that outlined in the text.

### § 275. The Direct Examination.

**a. Scope of Rules Governing.**—The affirmative of the issue involves a co-ordinate right, that of opening the case to the jury. The pleadings taken as an entirety are supposed to present the issues that call for the litigation, and under our present system of pleading, it very frequently occurs that the defendant has the affirmative of the issue, and where such is the case, he is entitled to open and close the case to the jury.

Under our former system of practice, if the defendant did not plead the general issue, but admitted upon the record the plain-

tiff's cause of action, and sought to avoid it by some affirmative defense, the rules and practice of the courts of England prevailed in many states. 2 Dunl. Pr. 637; 1 Paine & D. 522; Graham Pr. 289. That rule is announced in an authoritative and able work on the practice of the courts of King's Bench, and the author there observes: "It has been laid down as a general rule, that the party who has to maintain the affirmative of the issue must begin the evidence. Where there are special pleadings, or where a special defense is not intended to be given in evidence under the general issue, it may, perhaps, be more accurate to say that the party who has added the *similiter* shall begin. If both parties, however, have added the *similiter* to the different sets of pleadings, in the same cause, then the plaintiff shall begin. When a special defense is intended to be given in evidence under the general issue, the party shall begin who would have been entitled to do so, if the defense had been specially pleaded." 1 Arch. Pr. 169, 170.

A celebrated judge has said: "In strict practice, he who has the affirmative ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard; and finally the rebutting proof of the affirmative, which closes the examination. In doing this, neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to this proof, until, by repeated experiments, he shall make it come up to the opinion of the court. An adherence to these rules generally, will be found necessary in all courts of original jurisdiction; and, without them, confusion, loss of time, captious and irritable conduct must follow. We say generally, for it will often be found necessary for the presiding court, for good reasons, to depart from them to attain complete justice, and when they ought or ought not to be varied, must in a good measure be left to the sound discretion and prudence of the court, and a court of error ought never to interfere for such departure, except where injustice is done by it." Per Mills, *J.*, in *Braydon v. Goulman*, 1 T. B. Mon. 115-118.

It is a warrantable presumption that the attorney retained to conduct a case, has fully considered the evidentiary facts necessary to sustain it; that he is fully aware of the scope and tendency of the testimony his witnesses can give, and that he has a reasonable apprehension of the obstacles he must sur-

mount, and the presumptions he must overcome. It becomes his duty to call and examine all the witnesses subpoenaed by him, whose testimony tends to prove the facts put in issue by the pleadings of the adverse party, as it will be a matter of discretion with the court whether the party having the affirmative of an issue shall be allowed to reopen his case and introduce further testimony in its support after the other party has given testimony in reply. *Hastings v. Palmer*, 20 Wend. 225; *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. 231; *Leland v. Bennett*, 5 Hill, 286; *Anthony v. Smith*, 4 Bosw. 503; *Ford v. Niles*, 1 Hill, 300; *Rex v. Stimpson*, 2 Car. & P. 415.

**b. Strict Mode of Procedure Seldom Pursued.**—The strict mode of procedure is scarcely ever pursued in active practice. The office of a direct examination, or examination in chief as it is also termed, is to lay before the court and the jury, the whole of the evidence of the witness that is relevant and material. The office of a re-examination is to explain, to rectify and put in order such matters as have been affected by the cross-examination. The examination of a single witness is an illustration of the manner of conducting the examination of all the witnesses in the cause. If the strict rules of examination are followed, the party who produces a witness is bound to ask all material questions on the direct examination, and if this is omitted it cannot be done in reply, for no new question can be put in reply which is not connected with the cross-examination and which does not tend to explain it. *Ford v. Niles*, 1 Hill, 300; *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282; *Meyer v. Goodell*, 31 How. Pr. 456; *Anthony v. Smith*, 4 Bosw. 503; *Shepard v. Potter*, 4 Hill, 202; *Hastings v. Palmer*, 20 Wend. 225; *Leland v. Bennett*, 5 Hill. 286; *Romertze v. East River Nat. Bank*, 2 Sweeny, 82; *Seibert v. Allen*, 61 Mo. 482; *Ober v. Carson*, 62 Mo. 209.

As a general rule, leading questions are not permitted upon a direct examination (See *People v. Oyer & Terminer Ct.* 83 N. Y. 436, 459, 460); but the rule is relaxed where an omission of the witness's testimony is evidently caused by a want of recollection which a suggestion may assist (*Cheaney v. Arnold*, 18 Barb. 434. See *O'Hagan v. Dillon*, 76 N. Y. 170), or where the witness is hostile to the party calling him (*Williams v. Eldridge*, 1 Hill, 249-255; *Great Western Turnp. Co. v. Loomis*, 32 N. Y. 127-139; *Bradshaw v. Combs*, 102 Ill. 428), or very ignorant (*Doran*

v. *Mullen*, 78 Ill. 342; *State v. Benner*, 64 Me. 267); and questions, though leading in form, are always competent, when merely intended to direct the attention of the witness to the subject matter of his testimony. *Lowe v. Lowe*, 40 Iowa, 220.

This subject meets with further exposition in subsequent pages.

### § 276. The Cross-Examination.

a. **A Preliminary Inquiry.**—There is manifest propriety in the remark, at this juncture, that before entering upon a cross-examination the question may arise, “Has the party any right to it?” The kaleidoscopic nature of a trial, the protean phases it assumes, all contribute to every conceivable diversity of incident. A witness is called to be sworn, and it forthwith appears a case of *idem sonans*,—he knows absolutely nothing of the case; the sheriff has subpoenaed the wrong party, do any rights of cross-examination accrue? The authorities are in conflict.

Restrictive methods of interpreting the right would suggest a negative answer. It is impossible to exhibit in a condensed or summary form any rule on the subject, which should influence judicial action on all occasions.

Since the doctrines of equity began to react upon the law, and especially since the impulse given by the brilliant career of *Lord Mansfield*, the courts have consciously adopted and applied the principles once under the ban of juridical displeasure relating to a party's rights with reference to a witness on the stand. The present system of equity as administered in this country and England is supposed to embody all the jural principles of morality which have been borrowed or incorporated from the civil canon and scholastic law. Under the Roman jurisprudence the right to cross-examine would exist, and cases can be conceived where adroit and disreputable counsel, for the sole purpose of misleading the court and jury by a specious display of zeal, in securing the attendance of a fictitious witness often at great expense, have deliberately subpoenaed a person of the same name, well knowing that the presence of his double—the witness in actual possession of the facts—would prove the blight and ruin of their cause. Could the cross-examination, then, tend in any way to disclose this possible duplicity? I think it would, and believe the weight of authority will sustain the right to cross-examine.

Again, a witness is called by a party, merely for the purpose of producing a written instrument belonging to the party, which is



to be proved by another witness. He need not be sworn, but if sworn, is he subject to cross-examination? The authorities are conflicting, with a tendency to allow examination.

**b. Theory of the Cross-Examination.**—It was a fundamental conception of the law of evidence from the earliest periods as soon as its principles had become established, and its peculiar methods become developed, that compensatory relief against the damaging effects of the direct examination could only be afforded through the medium of a cross-examination of the same witness, and not by rebutting testimony of other persons. The earlier English cases failed to establish any specific rule and left the matter in a condition of uncertainty. There were dicta of eminent judges, and some decisions which undoubtedly suggested the present rules, but the guarded and restricted manner of these expressions indicate the crudities of the environment, at that time, of evidentiary law.

Propositions which are now almost axiomatic, mere commonplace truisms, were then the subject of controversy and of doubt, and rules since embodied in statutory legislation were then matters of doubtful propriety, and even dangerous expediency. An historical survey of the law of evidence, however interesting and attractive, is not embraced within the scope of the present treatise. Our present concern is with the cross-examination.

After the witness has been examined in chief, the adverse party is at liberty to cross-examine him. The purpose of a cross-examination is either to impugn the credit of a witness, or to get him to explain or give a color to what he has already stated, in his examination in chief, so as to render it less unfavorable to the party cross-examining. You may cross-examine him for the purpose of showing that he has no great respect for the moral obligation of the oath he has taken; or to show that however he may design to speak the truth, his means of knowledge upon the subject of his evidence were so limited he may possibly have been deceived in what he asserted in his examination in chief; or to show that he is interested in the event of the action, for although interest would not disqualify him from testifying, it would be a question whether it affected his credit; or to show that he has been under arrest or punished for offenses, or otherwise so degraded that no dependence can with safety be placed upon his testimony; or to impeach his veracity by showing that he has at other times

made declarations, by parol or in writing, or done acts inconsistent with the evidence he has given upon his examination. 3 Wait, L. & Pr. (ed. 1885) 559.

In general, every witness subjected to a direct examination may be cross-examined at the option of the adverse party. *Wilson v. Wagar*, 26 Mich. 452; *Toole v. Nichol*, 43 Ala. 406; *Burghart v. Brown*, 51 Mo. 600.

**c. Object of.**—The object of the cross-examination is to break the force or destroy the effect of the testimony given by the witness upon his direct examination, or to lay the foundation for testimony of other witnesses which shall have that effect. When a witness has been examined in chief, the other party has the right to cross-examine for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motive, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, his powers of discernment, memory and description. *Butler v. Flanders*, 12 Jones & S. 531.

**d. Importance of the Right.**—As an amplification of the views expressed in the preceding text, we may state the object of subjecting a witness to this test of cross-examination.

However artful the fabrication of falsehood may be, however extended the capacity for lying, however blunted the moral sense and acute the intellectual perception, few men have sufficient mastery over details and grasp of memory to elude the entangling meshes of rigid cross-examination, especially if any interval elapsed between two separate and distinct examinations and the questions are put by an adroit attorney.

Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation, or sternness of manner, that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood and give him time to consider how seeming contradictions may be reconciled. The most effectual method is to examine rapidly and minutely, as to a number of subordinate and apparently trivial points in evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skillfully laid, it is

rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that, in the course of such rapid examination, facts most material to the cause are elicited which before were but partially admitted. In such cases, there is no good ground on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they become tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such deposition from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens that the most important testimony in a case is extracted from the most unwilling witness, which comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal. *Alison*, *Prac. Crim. L.* 546, 547. See also *Evans* on Cross-Examination, in his Appendix to *Poth. Obl. no. 16*, vol. 2, pp. 233, 234. *Lord Bacon*, in his essay on *Cunning*, shrewdly observes: "A sudden, bold, and unexpected question doth many times surprise a man and lay him open. Like to him that, having changed his name, and wakeing in Paul's, another suddenly came behind him, and called him by his true name, whereat, straightway he looked back." This "dodge" has been successfully practiced on a deserter, who, after solemnly asserting that he had never been a soldier, betrayed his falsehood by obeying a sudden word of command, "to stand at ease." The late *Lord Abinger*, whose powers as a cross-examining counsel were unrivalled, was fond of giving his juniors this advice: "Never drive out two tacks by trying to hammer in a nail." Had Sir James Coleridge, *Atty-Gen.*, remembered this axiom in the *Tichborne* cause, the criticisms on his cross-examination of the claimant would have been less severe, or at least less merited.

**e. Scope and Range of.**—On the cross-examination counsel should be allowed a free range within the subject-matter of the direct examination (*Buckley v. Buckley*, 12 Nev. 423); and a wide latitude should be given to a party who has to prove a negative (*Anderson v. Russell*, 34 Mich. 109); or to one examining a witness who was a participant in an alleged fraud. *Anderson v. Walter*, 34 Mich. 113; *Jacobson v. Metzger*, 35 Mich. 103.

It is always competent on cross-examination to call out any fact

which will break the force and destroy the effect of the testimony of a witness given on his direct examination, or which will tend to qualify the statements made by him on his examination in chief, and show that they do not necessarily establish the facts which they were introduced to prove. See *Baird v. Daly*, 68 N. Y. 547.

A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own, and calling him as such, in the subsequent progress of the cause. A party cannot, by his own omissions to take an objection to the admission of improper evidence, brought out on cross-examination, found a right to introduce testimony in chief to rebut it or explain it. *Philadelphia & T. R. Co. v. Stimpson*, 39 U. S. 14 Pet. 448, 10 L. ed. 535.

The legitimate cross-examination of a witness, as to the issues involved in the action, is limited to those matters as to which the witness was interrogated upon his direct examination. In strict practice a party cannot introduce his case to the jury by cross-examining the witness of his adversary. A party has no legal right to cross-examine a witness except as to facts and circumstances connected with the matters stated on the direct examination. *Bell v. Prewitt*, 62 Ill. 362. See *Harrison v. Rowan*, 3 Wash. C. C. 580; *Ellmacker v. Buckley*, 16 Serg. & R. 77; *Castor v. Bavington*, 2 Watts & S. 505; *Floyd v. Bovard*, 6 Watts & S. 75; *Buckley v. Buckley*, 12 Nev. 423; *Cramer v. Cullinane*, 2 McArthur, 197.

As a general rule the range and extent of the cross-examination is within the discretion of the judge, as we have seen in the case of *White v. McLean*, 47 How. Pr. 193, with the limitation, however, that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character. If this limitation is not disregarded, the appellate court can only interfere where there has been an abuse of this discretion. *People v. Oyer & Terminer Court, New York*, 83 N. Y. 436.

The cross-examination of a witness cannot be confined strictly to the precise subjects called to his attention upon his direct examination, but should be allowed to extend to any matter not foreign to the subject-matter of such examination, tending to lim-

it, explain or modify. *Haynes v. Ledyard*, 33 Mich. 319; *Baird v. Daly*, 68 N. Y. 547. It is the tendency of the direct examination which determines the subject of it as a test for the propriety of a cross-examination. *Campau v. Dewey*, 9 Mich. 381. If the cross-examining counsel, in violation of the rule, examines a witness as to matters not drawn out upon the examination in chief, the witness, as to such new matter, becomes his own, the testimony becomes the direct and affirmative evidence of the examining party, and in substance and effect the cross-examination ceases, and becomes subject to all the restraint of a direct examination. *Mattice v. Allen*, 33 Barb. 543; *Bassham v. State*, 38 Tex. 622.

Various theories have been indulged respecting the scope of the cross-examination, and there is considerable diversity in the judicial dicta respecting the subject. Much of this diversity arises from different statutory systems, prevailing at different periods. Other distinctions are grounded upon a blind subserviency to English models, or from a too slavish veneration for the binding force of precedent. It is a rule of frequent iteration that the court is not bound to permit cross-examination on questions about which the witness gave no evidence on his direct examination. *Chicago & R. I. R. Co. v. Northern Illinois C. & I. Co.* 36 Ill. 60. The Michigan and Nevada courts have imposed a partial limitation on the operation of this view, and hold that the cross-examination should not be restricted to the precise subjects called to the attention of a witness on his examination in chief, but should be allowed to extend to any matter not foreign to the subject-matter of such examination, and tending to limit, modify or explain. *Haynes v. Ledyard*, *supra*. See also *Ferguson v. Rutherford*, 7 Nev. 385.

The cross-examination of a witness is of necessity, largely under the control, and within the discretion of the primary court; and appellate courts are reluctant to review and reverse their action, in limiting or enlarging its area, when the purpose is to show the bias or motive, or to impeach the witness. Much must depend on the conduct and attitude of the witness during the examination; and much may depend on the course of the cross-examining counsel. *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8.

Cross-examination of a witness should generally be confined to matters brought out in the examination in chief. *Atchinson v. Rose*, 43 Kan. 605.

A witness may be cross-examined as to the condition of his mind, memory, and facilities of knowing what occurred. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156.

A witness cannot on re-direct examination be examined as to any facts which do not tend to explain the subject of the cross-examination. *Fry v. Leslie*, 15 Va. L. J. 37.

**f. What May be Asked.**—Where the adverse party chooses to exercise the right of cross-examining a witness, he cannot ask him questions which assume facts to be proved that are not proved; nor can he cross-examine him as to a distinct collateral matter, for the purpose of afterward impeaching his testimony by contradicting him. And if the witness is questioned as to any such collateral matter, and answers, his answer is conclusive and cannot be contradicted. *Haines' Treatise*, (12th ed.) 674.

Where a party examines a witness as to a conversation, the opposing party can only examine the witness upon the conversation about the same subject-matter, but not about a conversation upon a different subject, not related to the primary conversation. It is, however, proper to ask a witness whether he has not, on some former occasion, given a different account of the matter of fact to which he has already testified, in order to lay a foundation for afterward impeaching him. Indeed, if it is intended to impeach him by proof of prior statements, inconsistent with his present testimony, it is necessary to interrogate him as to those statements, and call his attention to the time, place and person, when, where and to whom, they are alleged to have been made. *Ibid.*

It is undoubtedly true that when a witness on cross-examination testifies to a collateral matter, the party cross-examining is not allowed to contradict that testimony. The reason of this is not that by his cross-examination, the party cross-examining has made the party his own. It is because a contrary rule would lead to the trial of numerous collateral issues; such, too, as the opposite party is not supposed to have expected to try. But this rule never applies to testimony which is not collateral, and which is material to the issue. When a party on cross-examination brings out evidence material to the issue, he is not necessarily bound by it, but may contradict it by other witnesses. If upon his examination in chief, a witness testifies that he has never done a certain act, the witness may be required on cross-examination to

answer whether he did not at a certain time and place state to a person named that he had done the act. *Pruitt v. Brockman*, 46 Ind. 56.

If on direct examination the witness gives his opinion as to value, he may be cross-examined in full as to his reasons for such opinions. *Missouri, K. & T. R. Co. v. Haines*, 10 Kan. 439; *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477. So if a witness swears to the general bad character of another witness, he may on cross-examination be asked to name the individuals whom he heard speak disparagingly of the witness (*State v. Perkins*, 66 N. C. 126); but not what was said. *Gulerette v. McKinley*, 27 Hun, 320.

Modern practice has failed to countenance any rule that requires absolute rigidity in the materiality of a question propounded in the course of the cross-examination. The latest development of evidentiary science allows considerable latitude in this direction in order to sift and probe the conscience of the witness, and to scrutinize his intent, prejudice and mental attitude. *Lefler v. Field*, 50 Barb. 407.

It is within the discretion of the court to permit counsel on cross-examination to ask a witness whether he has not sworn falsely on some specified occasion, or in a particular suit.

A witness may be asked questions affecting his own character, and consequently his credit, though such questions have no relation to the matters in issue. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. Certain restrictions have been placed on this species of cross-examination in criminal trials when the accused is the witness under examination. 3 Wait, L. & Pr. (5th ed.) 563.

A witness under cross-examination at least on the trial of a civil case, cannot be asked any questions as any facts which, if admitted, would be collateral and wholly irrelevant to the matters in issue, and which would in no way effect his credit, and still less can he be cross-examined as to such facts, for the purpose of contradicting him by other evidence, and in this manner to discredit his testimony. *State v. Benner*, 64 Mo. 267; *Kobbe v. Price*, 14 Hun, 55; *Kaler v. Builders' Mut. F. Ins. Co.* 120 Mass. 333.

And if the witness answers such an irrelevant question before it is disallowed or withdrawn, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter.

*Davis v. Roby*, 64 Me. 427; *Iron Mountain Bank v. Murdock*, 62 Mo. 70.

### § 277. Refusal to Answer.

#### a. Disparaging Questions Not Relevant to the Issue.—

The court in which a cause is tried, in the exercise of its discretion, may exclude disparaging questions, not relevant to the issue, on the cross-examination of a witness, though put for the avowed purpose of impairing his general credit; and this may be done on the objection of the party, without putting the witness to his claim of privilege.

In the exercise of this discretion, such questions should be allowed, when there is reason to believe it may tend to promote the ends of justice; but they may properly be excluded, when a disparaging course of examination seems unjust to the witness, and uncalled for by the circumstances of the particular case.

On questions of this nature, the decision of the original tribunal is not subject to review, unless in cases of manifest abuse or injustice. *Great Western Turnp. Co. v. Loomis*, 32 N. Y. 127.

Judge Porter, in the last case cited, says: "The judgment now under review was rendered on the assumption that it is the absolute legal right of a litigant to assail the character of every adverse witness, to subject him to degrading inquiries, to make inquisition into his life, and drive him to take shelter under his privilege, or to self-vindication from unworthy imputations, wholly foreign to the issue on which he is called to testify.

"The practical effect of such a rule would be, to make every witness dependent on the forbearance of adverse counsel, for that protection from personal indignity which has been hitherto secured from the courts, unless the circumstances of the particular case made collateral inquiries appropriate. This rule, if established, will be applicable to every tribunal having original jurisdiction. It will perhaps operate most oppressively in trials before inferior magistrates, where the parties appear in person, or are represented by those who are free from a sense of professional responsibility. But it may well be questioned whether, even in our courts of record, it would be safe or wise to withdraw the control of irrelevant inquiry from the judge, and commit it to the discretion of adverse counsel. The interposition of the court has often been necessary to protect witnesses from the rigor of



examinations, conducted on the supposition that they were entitled to such protection. When the power of protection is withdrawn, is it to be expected that counsel, deeply enlisted for their clients, and zealous to maintain their rights, would feel bound to exercise toward witnesses a forbearance which the courts themselves refuse? There is much diversity of opinion, even among eminent members of the profession, as to the measure of obligation imposed upon counsel, by the implied pledge of fidelity to the client. This could not be more strikingly illustrated than by the atrocious but memorable declaration of one of the leading lawyers of England, on the trial of Queen Caroline, that 'an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client, and none other. To save that client by all expedient means, to protect that client, at all hazards and cost to all others, and, among other, to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other' (1 Brougham's Speeches, 63). Such a proposition shocks the moral sense, but it illustrates the impolicy of divesting the presiding judge of the power to protect witnesses from irrelevant assault and inquisition. From the nature of the case, he is in a position and frame of mind, more favorable than that of counsel, to arrive at a safe and impartial conclusion. The balance of justice should be held as steady and even between the witness and the parties, as between the opposing litigants, and the rights of neither should be committed to the absolute discretion of counsel.

"It is believed that the practice, on this subject, which has heretofore prevailed in this State, rests on sound principle, and is abundantly fortified by authority. Its propriety seems to have been always recognized in the English Courts, and the judges have never hesitated, at *nisi prius*, to exercise a liberal discretion in the admission or exclusion of irrelevant inquiries tending to degrade the witness, according to the varying circumstances under which the offer was made.

"No better illustration of this can readily be found than is furnished by a comparison of three of the reported decisions of Lord Ellenborough, 'that great master of the law of evidence,' as he is designated by Phillips and Roscoe. In the case of *Frost v. Hallowsay*, the bearing of the witness was such, that he not only permitted an inquiry whether he had not been tried for theft, but

threatened to commit him if he refused to answer the question (1 Phillips, Cowen & Hills' ed. 283, *note*). In the case of *Millman v. Tucker*, when a witness was asked by Lord Erskine if he had not been imprisoned for forgery, he gave permission to the witness to answer the question if he felt it due to himself, but advised him not to do so, and declared that if he himself had been asked such a question, he should have refused to answer 'for the sake of the justice of the country, and to prevent such an examination' (Peake, Add. Cas. 222). In the case of *Rex v. Lewis*, the prosecutor was asked on cross-examination if he had been in the house of correction. Lord Ellenborough at once interposed and prohibited the inquiry, on the ground that witnesses engaged in the discharge of a legal duty should not be subjected to improper investigation. 4 Esp. 226."

**b. Leading Case Examined.**—In the leading case of *Spencely v. De Willott*, the disparaging question was overruled, without any objection by the witness or any claim of privilege. In that case, the avowed object of the defendant's counsel was to discredit the witness. The defendant's counsel declared it to be their purpose, to avail themselves of the answer if affirmative, and if negative, to contradict the witness. Lord Ellenborough excluded the question, on the ground that it called for an answer, which if affirmative, would be irrelevant, and if negative, would not be open to contradiction. At his instance, for the purpose of setting the practice at rest, the decision was reviewed on bill of exceptions, and the exclusion of the question was sustained by all the judges. 7 East, 108.

Since that decision, we find no case in the English courts, in which a new trial has been granted for the exclusion of disparaging questions irrelevant to the issue; though since that time, as before, the judges at *nisi prius* have continued to exercise their discretion by permitting such collateral inquiries when the ends of justice seemed to demand it, and in all other cases excluding them in justice to the witnesses. The existing rule on that subject in England, is undoubtedly that stated in the note subjoined to the report of the case of *Rex v. Pitcher*. In practice, the asking of questions to degrade the witness is regulated by the discretion of the learned judge in each particular case. 1 Car. & P. 85.

Much confusion and conflict in the treatment of this subject is apparent in the English text-books, as well as our own. This is

mainly due to the fact, that the question usually arises only at *nisi prius*. The rulings of the judges in different cases, being on a mere question of practice at the trial, are not the subject of review, and are necessarily acquiesced in by the parties. The decisions, in these, as in all other cases, resting in mere discretion, have been of course inharmonious, according to the views of different judges, and the varying circumstances of the cases in which the question was presented. The text-writers, as well as the judges, differ in their views as to the rules which should control the exercise of this discretion; some being predisposed in favor of the liberal allowance of irrelevant crimination, and others preferring the practice of rigid exclusion.

**c. Antagonism of Text-Writers.**—Thus, two writers, as acute and discriminating as Roscoe and Peake, cite respectively the *Case of Yewin*, 2 Campb., and that of *Spencely v. De Willott*, in 7 East, 108, as authority for propositions in apparent antagonism. Roscoe regards those cases as establishing the rule, “that questions not relevant may be put to the witness for the purpose of trying his credibility.” Roscoe, Crim. Ev. 181. Peake quotes the same cases, as superseding his elaborate discussion, in the text of the first edition of his work, as to the right to put such questions, and adds, that “as it may now be considered as settled, that matters wholly foreign to the cause cannot be inquired into from the witness himself, those arguments are now reprinted in the appendix.” Peake, Ev. (Norris’s ed.) 204. But when we reflect that both authors, in what they wrote, had in view the existing practice of England, by which the limits of collateral examination were under the control of the presiding judge, the seeming conflict disappears, and their respective conclusions harmonize with each other, and with the cases of which they rest. It is entirely true, as affirmed by Roscoe, that inquiries on irrelevant topics to discredit the witness, may be permitted on the trial, in the discretion of the judge; and equally true, as affirmed by Peake, that such inquiries may be excluded, without infringing any legal right of the parties. The writers on evidence have endeavored to aid the courts in the exercise of this discretion, with such results as they supposed to be deducible from the various decisions at *nisi prius*; but from the nature of the case, no fixed rule could be devised, defining the right and limiting the extent of irrelevant inquiry, which would be just or safe in universal application.

d. **Further Examination of Authorities.**—The opinion in the case of *People v. Blakeley*, 4 Park. Crim. Rep. 176, rests mainly on prior decisions in our own courts, which, when examined and classified, do not seem to us to uphold the present rule.

In several of the cases reported the question did not arise. In one of them, the discrediting evidence was received, and its admission was held to be no ground for reversal. *Howard v. City F. Ins. Co.* 4 Denio, 502. In another, the witness answered the disparaging questions; and a new trial was granted, on the ground that the party calling him should have been permitted to give general evidence in support of his character for truth. *People v. Rector*, 19 Wend. 569. In a third, the witness claimed his privilege; the judge held that he was not bound to answer, and the court sustained his decision. *People v. Mather*, 4 Wend. 229.

In four of the cases cited, the exclusion of the discrediting evidence was held to be erroneous. In neither of them did the witness claim his privilege. In each the proof offered and rejected was adjudged to be material and relevant to the issue. *Jackson v. Humphrey*, 1 Johns. 498; *Southard v. Rexford*, 6 Cow. 254; *People v. Abbott*, 19 Wend. 192; *People v. Bodine*, 1 Denio, 281.

None of these decisions tend to sustain the proposition that the exclusion of inquiries as to particular transactions, wholly irrelevant to the issue, for the purpose of degrading the witness, is cause for reversal by an appellate tribunal.

It is expressly adjudged that the party is not entitled to an answer to an inquiry tending to disgrace the witness, unless the evidence would bear directly upon the issue. *Lohman v. People*, 1 N. Y. 380, 385.

If, therefore, the defendant in this case had any cause of complaint, it was not that he was deprived of an answer to which he was entitled in law, but that he was deprived of the benefit of an irrelevant fact, the truth of which does not appear, and which, if true, the witness was under no obligation to disclose. The office of a court of review is to correct errors in law, prejudicial to the appellant. If the answer was not matter of legal right, the question could properly be excluded unless it was relevant to the issue.

But it is said that as the question tended to degrade the witness, he alone could take the objection. Strictly speaking, there is no case in which a witness is at liberty to object to a question. That is the office of the party or the court. The right of the witness is

to decline an answer if the court sustains his claim of privilege. When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege. But when the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge.

Every court having original jurisdiction is authorized to reject evidence on immaterial issues, though objected to by neither party; and if it were otherwise, it would be a reproach to the administration of justice. *Corning v. Corning*, 6 N. Y. 97; *People v. Lohman*, 2 Barb. 221.

If, however, the question were *res nova*, there would be no difficulty in arriving at the same conclusion. The practice which has heretofore prevailed in this respect has been satisfactory to the community, the bench and the bar. Questions of this nature can be determined nowhere more safely or more justly, than in the tribunal before which the examination is conducted. Justice to the witness demands that the court to which he appeals for present protection shall have power to shield him from indignity, unless the circumstances of the case are such that he cannot fairly invoke that protection. If the range of irrelevant inquisition be committed to the discretion of adverse counsel, it will be no reparation of the wrong to the witness, that the judgment, in which he has no concern, may be afterward reversed by an appellate tribunal. *Great Western Turnp. Co. v. Loomis*, 32 N. Y. 127.

The antagonistic element that was for many years the inseparable accompaniment of this doctrine was introduced and maintained by a school of judges whose prestige has passed away. The decisions rendered under the dominance of their opinion have been modified, limited, and in many instances overruled; and it is only in isolated instances that the effect of their restrictive and reactionary views is apparent.

### § 278. Discretionary Powers of the Court.

**a. Unless Abused not Reviewable.**—It is a rule of very extensive application that the limits to which a cross-examination shall be conducted are discretionary with the court, and this discretion, unless palpably abused, is never reviewable by the appellate court.

There is no uniform rule governing the matter, greater liberties being allowed when the witness shows partisanship than when he evinces impartiality; and it requires a strong case to justify a

reversal for the allowance of too much latitude on the part of the cross-examiner. *Ingram v. State*, 67 Ala. 67. This discretion particularly extends to the range of a cross-examination in disparagement of the character of a witness. *Gutterson v. Morse*, 58 N. H. 165.

The extent of a cross-examination upon matters immaterial to the issue, is in the discretion of the court.

There is no case which holds that it is error to exclude evidence immaterial to the issue offered upon cross-examination for the purpose of discrediting the witness.

There are cases where such evidence has been received (*Rex v. Edwards*, 4 T. R. 440; *Howard v. City F. Ins. Co.* 4 Denio, 502); and there are cases where such evidence has been rejected (*Rex v. Pitcher*, 1 Car. & P. 84; *Macbride v. Macbride*, 4 Esp. 242; *People v. Genung*, 11 Wend. 18; *Ward v. People*, 6 Hill, 144); but there is no case where a judgment has been reversed or a new trial granted for the exclusion or admission of such evidence.

The true rule is laid down in *Rex v. Pitcher*, 1 Car. & P. 85, n, "In practice, the asking of questions to degrade the witness is regulated by the discretion of the learned judge in each particular case."

Cross-examinations to shake credits are, it should be remembered, perilous experiments, and should be resorted to cautiously. Lord Abinger, one of the most consummate of advocates, thus speaks in his biography: "I learned by much experience that the most useful duty of an advocate is the examination of witnesses, and that much more mischief than benefit results from a cross-examination. I therefore rarely allow that duty to be performed by my colleagues. I cross-examine, in general, very little, and more with a view to enforce and illustrate the facts I mean to rely upon, than to affect the witness's credit,—for the most part a vain attempt."

See on this topic a thoughtful pamphlet entitled "Examination of Witnesses. Hints for Conducting a Trial."

**b. Extent of.**—One of the most vexatious and intricate questions connected with this entire topic, arises in regard to the right of the trial court to close the cross-examination of a witness, and direct his removal from the stand. Cases have frequently arisen in which this alleged right has been exercised, and counsel of a recognized eminence and reputability have strenuously denied the

existence of any authority for so arbitrary a proceeding. The most careful and critical review of the authorities fails to disclose an adjudication in point until 1874, when the New York Commission of Appeals was called upon to consider the case which presented this identical question in a very aggravated form. The opinion by *Mr. Commissioner Dwight* exhausts the subject.

“The principal question at the trial concerned the ownership of furniture which had been sold by one Sheridan to the defendant. The plaintiff maintained that the title was in himself, and that Sheridan’s act was nugatory. To sustain this view the plaintiff was examined in his own behalf. He was subjected to a protracted cross-examination by the defendant, the report of which occupies nearly fifty folios. To this cross-examination there was no check, and wide latitude was taken in the questions asked. It was closed by the defendant, when the witness was again called by the plaintiff for direct examination. When that was closed there was an extended re-cross-examination. . . . The judge then said to the defendant’s counsel: ‘You have exhausted the witness; you will never stop it, unless I stop it.’ The counsel, still persisting, asked the witness other questions concerning the curtains, when the judge told the witness to leave the stand. On the objection of counsel that they had not finished the examination, the judge further said that he considered the cross-examination exhausted, and that he would close it. To this ruling the defendant excepted. These facts present a question as to the power of the judge, of his own motion at the trial, to close a cross-examination.

c. **Indulgence of.**—“ . . . The importance of according to parties, to an ample extent, the right of cross-examination will not be denied. It is often the only successful method of eliciting truth from a captious, unwilling or even forgetful witness. The questions to be asked vary so much with the intelligence, spirit, temper and memory of the witness, that they cannot be reduced to precise forms. From the necessity of the case the whole subject rests largely with the discretion of the court. A wise judge will err on the side of indulgence rather than strictness, and permit questions to be asked touching the veracity, bias and temper of the witness, in deference to the views of cross-examining counsel, even though, from his own point of view, the examination may be unreasonably protracted. He will reflect that he cannot, in gen-

eral, know so much of the case as counsel who has given it careful attention, and who has sources of information as to the position which the witness holds to the cause that are not accessible to himself.

“This indulgence, however, has its limits. Were it not so, trials might be protracted to an extent prejudicial to the rights of the other suitors, and to the interests of the public at large. It is even conceivable that a close and minute cross-examination may be carried on solely to annoy a perfectly veracious witness, or to try, and perhaps overcome the patience of the judge. The court must have the power to control the whole matter in the exercise of a sound discretion. If that discretion be abused, correction of the abuse must be sought in the appellate court. In the case of *Hunter v. Kehoe, Ridgway Pall.* (5 Schwabs, 380), Lord Clow-nell observed, as a general remark, that cross-examination had gone to an unreasonable extent; and he had in general permitted gentlemen to go as far as they pleased, because if there was an honest case on the other side, it would do them no good. This case is cited as law in 2 Evans’ Pothier, 269; 2 Stark. Ev. note k (Am. ed. 1836) 1739,. This statement is a strong recognition of the right of the court, in its discretion to check a cross-examination. *Com. v. Sacket*, 22 Pick. 394; *Lawrence v. Barker*, 5 Wend. 301; *Great Western Turnp. Co. v. Loomis*, 32 N. Y. 127; *Greton v. Smith*, 33 N. Y. 250; *Rea v. Missouri*, 84 U. S. 17 Wall. 532, 21 L. ed. 707.

“This rule could not in general, be so far extended as to exclude a question, which was material to the issue (*Com. v. Sacket, supra*); though, even in that case, if all the material questions had been asked, and there was a needless repetition and waste of time, the same principle must be applied, and with the exercise of a discretion allowed, subject to review in case of abuse.

**d. Illustration of the Rule.**—“In the present case there was no abuse of discretion. The cross-examination had been very full. The witness had once been permitted to leave the stand. On the re-cross-examination the questions had been numerous; and to a particular question the witness answered that he did not remember; and to a second question to the same general import he had given the same answer. The question was of no importance except as testing the memory of the witness. The judge then intimated that he should close the examination, whereupon coun-



sel asked the same question to which he had already received an answer. It was at this stage that the judge interfered and directed the witness to leave the stand. The fair interpretation of his act is that he intended to close the examination on that particular point. Had the counsel for the defendant proposed a material question, not included in the questions and answers already made, the matter might have assumed, on appeal, a very different aspect. As the case is presented there is no plain abuse of discretion; and without that the court will not interfere. Said Parke, in *Middleton v. Barned*, 4 Exch. 243: 'We never interfere in such a case unless it be perfectly clear that a learned judge has wrongly exercised his discretion.' *Great Western Turnp. Co. v. Loomis*, 32 N. Y. 127.

"It makes no difference that the witness under examination was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court. *Clarke v. Saffery*, Ryan & M. 126; *Rea v. Missouri*, 84 U. S. 17 Wall. 532, 21 L. ed. 707." *White v. McLean*, 47 How. Pr. 193.

The views of *Commissioner Dwight*, as above outlined, were fully concurred in by the entire commission, which was then composed of *JJ. Lott, Earl, Gray and Reynolds*, and the decision has been regarded as absolutely controlling upon all questions affecting the juridical power over cross-examination.

Further matters of interest appear in the course of this singularly exhaustive opinion, but we refrain from further citation, as the portion reproduced elucidates the principle under review.

### § 279. The Re-Direct Examination.

a. **What Questions are Pertinent.**—The extended treatment given the subject of cross-examination and the examination in chief, leaves but little to be added regarding the subject of the re-direct examination, the main object of which is to neutralize the effect of the cross-examination, to explain, modify, or limit the testimony elicited, or in some instances, to amplify and develop a fact called out. The counsel have a right on the re-direct examination, to ask all such questions as may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they are in themselves doubtful; and also to ascertain the motive by which the witness

was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. *Schaser v. State*, 36 Wis. 429.

“One of the most celebrated cases in the whole annals of our jurisprudence, a case that has left its impress upon almost every department of substantive law, and has been peculiarly controlling upon many of the rules of evidence, was Queen Caroline’s case, commonly cited as “*The Queen’s Case*,” 2 Brod. & B. 313. The melodramatic incidents of that trial—the exalted social status of the parties, the over-shadowing prominence of the counsel employed, and the intense and absorbing interest that centered around one so closely identified with the heir of the British crown, all conspired in lending a glitter and prominence to the case, apart from the weighty and abiding influence of the various rulings of the trial court. Directly applicable to the point now under review, was one of the decisions in that case. After very minute and able discussion, the judges hold, that where proof on cross-examination of a detached statement made by or to a witness at a former time the party calling that witness, upon the re-direct examination, is not authorized in showing all that was said at the same time, but only so much as can be in some way connected with the statement that was actually proved. See also *Prince v. Samo*, 7 Ad. & El. 627, 3 Nev. & P. 137, recognized in *Sturge v. Buchanan*, 10 Ad. & El. 605.

**b. Rights of Opposite Counsel.**—It would be a manifest invasion of every principle of fair dealing to allow counsel to cross-examine the witness as to facts which were not admissible in evidence, and then preclude the other party from the right to re-examine him to the evidence so given. Hence the force and efficacy of the well recognized rule that a witness cannot obtrude evidence on cross-examination, which he could not have been permitted to give on an examination in chief. But if counsel voluntarily cross-examined as to inadmissible matter, the opposite counsel is entitled to re-examine upon it. *Blewett v. Tregonning*, 3 Ad. & El. 554; *Greville v. Chapman*, 5 Q. B. 731.

**c. The Rule Established by the Michigan Court.**—*Judge Cooley* has held that it is within the sound discretion of the trial court to permit any question to be asked on re-direct examination which it was proper to have admitted on the examination in chief. *Hemmens v. Bentley*, 32 Mich. 89.

Where collateral facts are called out in the cross-examination of a witness, tending to create distrust of his integrity, fidelity or truth, it is competent for the adverse party to ask of the witness an explanation which might show the consistency of such facts with his integrity, fidelity and truth, although circumstances might thus be proved which were foreign to the principal issue, and which but for such previous cross-examination, would not have been permitted to be proved. *United States v. 18 Barrels of High Wine*, 8 Blatchf. 475. Frequently on cross-examination, the veteran lawyer will detect the presence of the same old question: "Have you had any conversation with the defendant relative to the trial of this cause?" If he says he has, a late New Jersey case allows the disclosure on re-examination of the nature and extent of that conversation. *Somerville & E. R. Co. v. Dougherty*, 22 N. J. L. 495.

When a statement forming part of a conversation is given in evidence by one party, whatever was said in the same conversation, tending to explain or qualify that statement, may be given in evidence by the other, but the latter cannot give in evidence, distinct and independent statements in the same conversation, in no way connected with the statement proved by his adversary, on the ground that he had opened the subject by his examination. *People v. Beach*, 87 N. Y. 512; *Walsh v. Porterfield*, 87 Pa. 376.

The re-direct examination as above stated is primarily designed to neutralize the effect of prejudicial testimony. It is usually limited to explanations and rebuttal, and to the precise incidents of the trial upon which the witness has been cross-examined. It is a supplementing incident of that cross-examination—a sort of pendant to it, and in scope and nature is co-extensive with that of the whole range of the examination. It has no precise limits and can have none, and in all of its essential features is under absolute domination of the trial court. *Jaspers v. Lano*, 17 Minn. 296; *Schlencker v. State*, 9 Neb. 241; *Carr v. Moore*, 41 N. H. 131.

§ 280. **The Re-Cross-Examination.**—This is a cumbersome term of indistinct genesis, and applies to a continuance of the original cross-examination, with reference more particularly to the matters elicited on the re-direct. Its allowance is solely within the discretion of the court, and the tendency is toward a liberal exercise of the right, in the furtherance of justice. *Thornton v.*

*Thornton*, 39 Vt. 122; *Wood v. McGuire*, 17 Ga. 303; *Gayle v. Bishop*, 14 Ala. 552; *Covanhovan v. Hart*, 21 Pa. 495; *Brown v. Burrus*, 8 Mo. 26.

§ 281. **Further Examination.**—As we have seen, the party holding the burden of proof ordinarily opens the case; he introduces such competent evidence as his case admits of, and having proved the material allegation of his complaint, or having made it a *prima facie* case, rests. His witnesses are cross-examined, and finally re-examined. A similar process is adopted by the other side, and finally the party holding the affirmative of the issue, and opening the case, introduces his evidence in reply. This is the legal, but by no means the usual course of proceeding, but through inadvertence due to neglect or misapprehension, there arises some defect in the character and quality of the proof, which it is still possible before the final submission of the case to the jury to supply. A single material question may have been carelessly omitted, and it is sometimes necessary to examine a witness as to entirely new matter, or to call several new witnesses for the purpose of attaining entire justice in the cause. In such cases a further examination is permitted, and with it a right to further cross-examine, re-examine, etc. 3 Wait, L. & Pr. (5th ed.) 573.

### § 282. **Rebutting Evidence.**

a. **Term Defined by Bouvier.**—That which is given by a party in the cause to explain, repel, counteract or disprove facts given in evidence on the other side. The term “rebutting evidence” is more particularly applied to that evidence given by the plaintiff, to explain or repel the evidence given by the defendant.

It is a general rule that anything may be given as rebutting evidence which is a direct reply to that produced on the other side (*Scott v. Woodward*, 2 M'Cord, L. 161); and the proof of circumstances may be offered to rebut the most positive testimony (*Nelson v. United States*, Pet. C. C. 235); but there are general rules which exclude all rebutting evidence. A party cannot impeach the validity of a promissory note which he has made or indorsed (*Winton v. Suidler*, 3 Johns. Cas. 185); nor impeach his own witness, though he may disprove, by other witnesses, matters to which he has testified (*Gray v. Gray*, 3 Litt. 465); nor can he rebut or contradict what a witness has sworn to, which is immaterial to the issue. *Com. v. Buzzell*, 16 Pick. 153; *Smith v. Henry*, 2 Bail. L. 118.

To rebut is to defeat or take away the effect of something. Thus, when a plaintiff in an action produces evidence which raises a presumption of the defendant's liability, and the defendant adduces evidence which shows that the presumption is ill-founded, he is said to rebut it. So, on a trial, when a fresh case, *i. e.* a case not merely answering the case of the party who began, is set up by the responding party, and evidence is adduced in support of such fresh case, the party who began may give evidence to rebut it, called "rebutting evidence," or proof of a rebutting case. Best, Ev. 785; Rapalje & Lawrence, Law Dict. *title* "Rebut."

Rebutting evidence is evidence adduced to rebut a presumption of fact or of law, that is, to avoid its effect; also, any evidence adduced to destroy the effect of prior evidence, whether by explanation or direct denial. 3 Steph. Com. 539; *People v. Page*, 1 Idaho, 194. See Anderson, Law Dict. *title* "Rebut."

b. **By Mr. Chamberlayne.**—Mr. Chamberlayne, in his well-known edition of Best's Law of Evidence, in the course of a valuable note appended to section 644, says:

"Re-direct examination is confined to explanation and rebuttal. It is limited to the precise matters upon which the witness has been cross-examined. Its scope, therefore, varies with that of the cross-examination, of which it is a supplementing incident. *Dutton v. Woodman*, 9 Cush. 255; *Schlencker v. State*, 9 Neb. 241; *Curr v. Moore*, 41 N. H. 131; *Jaspers v. Lano*, 17 Minn. 296, 305; *Baxter v. Abbott*, 7 Gray, 71, 82; *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495. Re-examination as to new matter is in the discretion of the court. *Brown v. Burrus*, 8 Mo. 26, 29; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Hemmens v. Bentley*, 32 Mich. 89; *Schlencker v. State*, 9 Neb. 241."

c. **Re-examination and Rebuttal as to Credit.**—"So where cross-examination has tended to the manifest discredit of a witness, general evidence of good moral character is admissible on re-examination or in rebuttal. *Hadjo v. Gooden*, 13 Ala. 718; *Isler v. Dewey*, 71 N. C. 14; *Wertz v. May*, 21 Pa. 274. But see *Harrington v. Lincoln*, 4 Gray, 563. So evidence of good character may be offered in rebuttal of evidence discrediting a witness. *Sweet v. Sherman*, 21 Vt. 23; *Hadjo v. Gooden*, 13 Ala. 718. But see *Stamper v. Griffin*, 12 Ga. 450, *contra*."

d. **Explaining New Facts.**—After a witness has been cross-

examined, he may be re-examined by the party who called him; and upon such re-examination he may be examined as to all matters upon which he has been cross-examined, which will give an opportunity for explaining any new facts which have thus come out. Counsel have a right, on such re-examination, to ask all such questions as may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they are in themselves doubtful; and also to ascertain the motive by which the witness was induced to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. Where a cross-examination is limited to a particular subject of a conversation had by him, the re-examination will be limited to the matter inquired about on the cross-examination, and the whole conversation cannot be required on the re-examination. *Greaton v. Smith*, 1 Daly 380, affirmed, 33 N. Y. 245; and see *Union Bank v. Mott*, 39 Barb. 180. See 2 Wait, L. & Pr. (3d ed.) 485.

### § 283. Conducting Examination, Order of Proof.

**a. Leave to Supply Omitted Evidence.**—It has been the settled practice of the court in its discretion to grant leave to supply evidence inadvertently omitted to be taken in the regular course, when it may be material to the justice of the cause, and the omission has been without bad faith or laches. *Plunkett v. Dillon*, 4 Del. Ch. 225. See *Lake v. Skinner*, 1 Jac. & W. 12; *Bloxton v. Drevit*, Prec. in Ch. 64; *Wallis v. Hodgeson*, 2 Atk. 56; *Banks v. Farquharson*, 1 Dick. 167; imperfectly reported in Amb. 145; *Atty-Gen. v. Thurnall*, 2 Cox Ch. 2; *Clarke v. Jennings*, 1 Anstr. 173; *Moons v. De Bernales*, 1 Russ. 307; *Abrams v. Winshup*, 1 Russ. 526; *Coley v. Coley*, 2 Younge & J. 44; *Hood v. Pimm*, 4 Sim. 101; *Maber v. Hobbs*, 1 Younge & C. 585.

**b. Order of Proof, Contradiction of Authorities.**—There is some considerable contradiction in the decisions regarding the order of proof, and the course of trial, in the different states; the party is only required to make a prima facie case in the opening and may reserve confirmatory proof in support of the very points made in the opening, till he finds upon what point his opening case is attacked, and then fortifying it upon these points. *Clayes v. Ferris*, 10 Vt. 112. But, at common law, the plaintiff puts in

his whole evidence on every point which he opens, and the defendant then puts in his entire case, and the plaintiff's reply is limited to new points opened by the defendant. And the court *in banc*, in passing upon the sufficiency of plaintiff's case, cannot look at the defendant's evidence. *Rawlings v. Chandler*, 9 Exch. 687. And it is held to rest in the discretion of the judge, subject to review *in banc*, at what stage in the trial evidence may be produced. *Wright v. Willcox*, 9 C. B. 650. The judge may recall a witness at any stage of the trial, and examine or cross-examine at his discretion. *Rex v. Watson*, 6 Car. & P. 653. See also 1 Greenl. Ev. § 469, b.

It is the duty of the judge to protect every witness from irrelevant, insulting or improper questions, and from harsh or insulting treatment, and a witness shall be detained only so long as the interests of justice require. *Com. v. Shaw*, 4 Cush. 593; *Com. v. Sacket*, 22 Pick. 394.

**c. Right of Juror to Question Witness.**—Occasionally a witness on the stand is asked a question by a juror, and it is matter of some perplexity to determine the extent and nature of this right. In one instance, a juror put a question to a witness and it was answered without objection by either party, but upon a repetition of the question one of the parties objected to it, and on appeal, where this objection was urged as a ground of error, the court said:

"I have not been able to find any authority for the responsibility of a party of a juror's improper question; one has as much right to except to it as another, and neither has the power to withdraw it. It would be rather hard to make either party suffer for the illegal questioning of a juror. A more appropriate remedy would be to move to strike out the answer, or to call upon the court to direct the jurors to disregard it. But in this case, the defendants were too late with their objection, after allowing it to be asked and answered once without objecting to it." *Kelly v. Commonwealth Ins. Co. of Penn.* 10 Bosw. 83-99.

**d. Limitations on This Right.**—Practical experience suggests that as in nearly every instance the questions propounded by a juror are more or less improper, the trial court, in the exercise of a sound discretion, can regulate the effect of these improprieties by sustaining a timely objection. It must be remembered that the first rule adhering to this entire subject of examination, is that

the questions propounded must possess some attribute of relevancy,—must have some tendency to elucidate the matter in dispute. Any failure to observe this principle will involve a tedious and annoying uncertainty, alike calculated to confuse and perplex the jury, and bewilder the court. Evidence which is clearly irrelevant may be excluded by the court on its own motion, even if both parties are willing to receive it. No court is bound to waste its time in hearing irrelevant testimony. *Corning v. Corning*, 6 N. Y. 97.

**e. Party Concluded by His Answer, When.**—A party who examines a witness as to a collateral matter, is concluded by his answer. He cannot draw out collateral statements from the witness, and for the purpose of discrediting him show that on some other occasion he stated differently.

To entitle the examining counsel to show the discrepancy for the purpose of impeaching the credibility of a witness, it must either appear that the testimony related to a point material to the issue on trial, or to a fact brought out on the examination of the adverse counsel. *Carpenter v. Ward*, 30 N. Y. 243.

#### § 284. Leading Questions.

**a. When Allowed.**—All practitioners of any extensive experience can recall the objection so flippantly intruded upon the record to questions asked as leading, and hence incompetent. Undoubtedly the legal profession has absorbed its full quota of mediocrities, but it is pitiful to find an attorney at this late day who has not the capacity sufficient to comprehend that a leading question is by no means objectionable on all occasions. Frequently the convenience of court and counsel are directly concerned by the allowance of leading questions. The phenomenal stupidity of some men on the witness stand, the bewildering stubbornness of others would suggest in the interest of expedition some way of reaching an answer even through the objectionable media of a leading question.

As soon as the witness has been duly sworn, it is the province of the party by whom he is produced to examine him. This is the direct examination, and in this examination leading questions, that is, questions which suggest to the witness the answer desired, or which embodying a material fact, admit of a conclusive answer by a simple negative or affirmative, are not, in general, allowed. But this rule is subject to common sense conditions, and it has



become the universal practice for counsel to recapitulate the acknowledged facts in the case, which have been already established, and even to lead the attention of the witness directly to the point in issue, by a palpable and suggestive question, that admits of but one answer. Most frequently this method of questioning prevails in introductory matters, but even in respect to others, it is frequently indulged, always tolerated and sometimes encouraged.

And where it appears from the testimony of a witness, that he is adverse to the party calling him, the court is justified in permitting leading questions to be put to him, and also questions which would be improper save to an adverse witness. *McBride v. Wallace*, 62 Mich. 451.

So where numerous details are involved in the examination, dates and items of a general and indiscriminate character are called for, and in countless other instances where the most tenacious and robust memory would need suggestions, leading questions are allowed. *Doran v. Mullen*, 78 Ill. 342.

**b. Discretion of the Trial Judge as to.**—The primacy of this rule cannot be questioned, in view of the wide range of authority which might be cited in its support, and it is an equally well recognized rule of evidence, that leading questions tending to show the prejudice, bias, malice, ill-will or vindictiveness of the witness against either party to the suit may be asked and answered without infringing upon any rights. Here again the sound discretion of the judge regulates the scope of the examination. *Batdorff v. Farmers' Nat. Bank*, 61 Pa. 179; *Wallace v. Tawnton St. R. Co.* 119 Mass. 91; *Schultz v. Third Ave. R. Co.* 89 N. Y. 242.

As we have previously seen a question may be leading in form and still unobjectionable, if merely intended to direct the attention of the witness to the subject matter of his testimony. *Lowe v. Lowe*, 40 Iowa, 220; *Shields v. Guffey*, 9 Iowa, 322.

The pernicious influence of leading questions is most felt and to be feared when the object of inquiry is to ascertain the details of a conversation, admission or agreement, and therefore more rigor is called for and justified in confining the direct examination in such cases to its appropriate rules. *Per* Marcy, J., in *People v. Mather*, 4 Wend. 248.

Leading questions are sometimes eminently proper on direct

examination, as, for example, when it becomes necessary in an action to prove the contents of a lost paper, and a witness is called by the plaintiff on that point. In such case it is proper to ask the witness to state whether the paper in the hands of the witness is a true copy of the lost paper. *Adams v. Harrold*, 29 Ind. 198.

Where the answer to a leading question, which is objected to, does no injury to the party objecting, he cannot complain as to the leading form of the questions. *Bulson v. People*, 31 Ill. 409.

**c. Instances of.**—Leading questions as we have shown are such as may be answered in the affirmative or negative, and suggest the desired answer. *Mathis v. Buford*, 17 Tex. 152.

A question to a witness is leading which puts into his mouth the words to be echoed back, or plainly suggests the answer which the party wishes to get from him.

If it is apparent that the witness is in the interest of the adverse party it is proper to permit the direct examination to take the form of a cross-examination.

If the question relates to introductory matter and be designed only to lead the witness with the more expedition to what is material to the issue, it may be put, though it be leading.

Putting the question in the alternative form, as whether or not a party did a certain act, specifying it, does not remove the objection to its being leading.

It is not allowable to put a question which assumes a fact proved, which is not proved, even on cross-examination. *People v. Mather*, 4 Wend. 229-248; *Carpenter v. Ambrosion*, 20 Ill. 170; *McClay v. Hedge*, 18 Iowa, 66.

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in an examination in chief, or a re-examination, except with the permission of the court, but such questions may be asked in cross-examination. Stephen, Dig. art. 128.

The chief rule of practice relative to the interrogation of witnesses is that which prohibits leading questions: *i. e.*, questions which directly or indirectly suggest to the witness the answer he is to give. The rule is, that on material points the party must not lead his own witnesses but may lead those of his adversary,

in other words the leading questions are allowed in cross-examination, but not in examination in chief. *State v. Benner*, 64 Me. 267.

It is sometimes said that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue, but although such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable, as if, on a traverse of notice of dishonor of a bill of exchange a witness were led either as to the fact of giving the notice, or as to the time when it was given. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances. Best, Evidence, (Morgan's notes) § 641.

The various definitions are the logical antecedents of the definition adopted by the Michigan Supreme Court, and it is one of the standing marvels of this entire discussion that science should have waited for so brief a definition: "No question is leading which does not suggest an answer." *Stoudt v. Shepherd*, 73 Mich. 588.

It will be remembered that the admission of leading questions is discretionary with the trial court. *State v. Chee Gong*, 16 Or. 534; *State v. Pugsley*, 75 Iowa, 742.

### § 285. Witness Must Remain the Witness of the Party Calling Him.

a. **Misconception on the Subject.**—An erroneous notion prevails as to the question on whose part the evidence given on the cross-examination is to be considered as being introduced. It is not unusual to find in bills of exception, a statement of the evidence drawn out on the cross-examination as evidence introduced by the party making the cross-examination tending to prove his case. This statement is always incorrect when used with reference to a legitimate cross-examination. All testimony elicited on such cross-examination consisting, as it does of facts which, though relating to the direct examination, may have been omitted or concealed in that examination, or facts tending to contradict, explain or modify such facts, or to rebut or modify such inference which might otherwise be drawn from them, must, in the nature of things constitute a part of the evidence given in chief; and

both together must alike be treated as evidence given on the part of the party calling the witness. The evidence given by the witness is not that alone given in chief, but it is that given in chief, as contradicted, explained, enlarged, narrowed or modified by the cross-examination. It is simply the combined result of both. *Wilson v. Wagar*, 26 Mich. 452.

b. **The General Rule.**—Ordinarily speaking the answers of the witness on a legitimate cross-examination must be deemed to be part of the evidence given in chief, *i. e.*, the witness still remains the witness of the party calling him, and does not become the witness of the party cross-examining him, who is not bound by his answers but is at liberty to contradict them with other evidence. But matters elicited on cross-examination, which are only admissible to weaken the force of the testimony in chief, ought not to go to the jury for a different purpose. *Rapalje*, Law of Witnesses, § 250.

If, however, the cross-examiner asks a question, a responsive answer to which operates against his side of the issue, he cannot get rid of the effect by objecting to the competency of the witness, or the admissibility of the evidence. *Bailey v. Cooper*, 5 Humph. 100; *Boteler v. Beall*, 7 Gill & J. 389; *Kelley v. Merrill*, 14 Me. 228.

The notion is widely diffused and has chrystalized into a written formula that a party is bound by the testimony of his own witnesses. The misconception and error that envelopes this proposition is astonishingly prevalent, and it is the principal function of this subdivision to dispel it. No error is so repulsively unmanageable as that error which embodies a scintillation of truth. The one under review has absorbed a certain element of verity, and has then become incrustated with a vast adhesion of nonsensical utterance, judicial and otherwise, that in no sense appertains to the subject.

The germ of this theory is found in a very plausible proposition that a party by calling a witness represents him as worthy of belief, and having introduced him to the court, under favorable auspices, and tacitly vouched for his character and accuracy, he is not at liberty to discredit him.

The distinction we wish to italicize is this, that while a party who has called a witness cannot impeach his general reputation for truth, he may contradict him as to any particular fact testi-

fied to, and this, although the evidence may collaterally have the effect of showing that the witness is generally unworthy of belief. *Hunter v. Wetsell*, 84 N. Y. 549.

And the general rule is that a party cannot, by proof of contradictory statements made by a witness he has voluntarily called, attack his testimony, but is bound by it, does not govern or apply in those cases where, by statutes or the rules of the common law, he is compelled to call him, as in the cases of wills, and in other cases where an attesting witness is required. *Peebles v. Case*, 2 Bradf. 226-242; *Bullard v. Pearsall*, 53 N. Y. 230; *Hunter v. Wetsell*, 84 N. Y. 549-556; *Brown v. Bellows*, 4 Pick. 187-189-194; *Cowden v. Reynolds*, 12 Serg. & R. 281; *Sigfried v. Levan*, 6 Serg. & R. 308-314; 2 Greenl. Ev. § 443.

An early English case reflects the judicial sentiment on this subject: "It is fair to judge a party by his own witnesses." *Dillon v. Dillon*, 3 Curtiss, 86. If a party puts upon the stand a witness who is for any reason assailable, that party asserts or admits the credibility of that witness. *Varick v. Jackson*, 2 Wend. 166-201; *Thompson v. Blanchard*, 4 N. Y. 303-311; *Fordham v. Smith*, 46 N. Y. 638, 44 How. Pr. 472.

**c. Recent Views on the Subject.**—The repugnance of our courts to adhere to the early rule that has exercised such influence over this topic, has received a very recent illustration. The Supreme Court of Colorado, in a critical review of the principles underlying the earlier decisions reached a conclusion in harmony with modern ideas and the best juridical exposition.

*Mr. Justice Elliott* delivered the opinion of the court, and it is difficult to find in the entire field of judicial expression a more luminous piece of legal analysis. It faithfully reflects the prevailing views on this subject both in Colorado and other jurisdictions, and may be well regarded as the settled rule in this country.

The following is the extract germane to this topic:

"How far a party may be allowed to go in an attempt to overcome the consequences of damaging testimony given by his own witness is a question of considerable difficulty. Questions of this character have engaged the attention of able jurists, as well as learned authors on the law of evidence. The doctrine of the common law, as sometimes stated, is to the effect that the party calling a witness recommends him as worthy of credit, and there-

fore cannot be permitted to impeach, cross-examine or discredit him in any way; also, that as a witness is presumed to be favorable to the party calling him, he must not be asked leading questions on his examination in chief. Exceptions to these rules have long existed, and it may be doubted if in common practice they were ever rigidly enforced to the extent above stated. The tendency of recent legislation, as well as of modern decisions, has been to relax somewhat the rules of evidence, so as to afford better opportunity for the development of the truth. Modern experience has also shown that a party may sometimes be deceived in the character and animus of a witness whom he has called, as well as in the testimony he is expected to give; and he learns after the witness has begun to testify,—a very inopportune time—that he has to encounter bitter and unscrupulous opposition where he had expected to receive only fair and honorable treatment. This may be evinced by reluctance or evasion on the part of the witness in answering questions, or by too great readiness in making or volunteering damaging statements contrary to his previous version of the matter. Under such circumstances where a party is really taken by surprise at the conduct of his own witness, it is in the discretion, and is often the duty of the trial court to allow a party to put leading questions to his own witness, as the only means of preventing an unwilling witness from concealing the truth by unsatisfactory or evasive answers; and in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectations of the party calling him, such party should be allowed to cross-examine such witness, for the purpose of refreshing his recollection, with the view of modifying his testimony, or of revealing his real *animus* in the case. But while a party should, when the occasion justifies it, be permitted to interrogate by leading questions, or cross-examine his own witness, and to ask him if has not theretofore made other or different statements from those he has just given in evidence, still sound discretion must be exercised, lest the privilege be abused. Neither upon reason or authority can a party be allowed to impeach his own witness by showing that his general reputation for truth and veracity is bad in the community where he is known; nor can a party, according to some authorities, be allowed to introduce other witnesses to show that his own witness, at another time, has made other or different statements from those

he has given in evidence on the trial." *Babcock v. People*, 13 Colo. 515.

It is scarcely necessary to state, in this connection, that when a party by one witness has introduced certain testimony, he is not necessarily bound thereby, but that he may give contradictory testimony by another witness or witnesses, and may thereafter, in argument, claim the benefit of the more favorable portion of such contradictory testimony. 1 Stark. Ev. 216; 2 Phil. Ev. 985; *Bullard v. Pearsall*, 53 N. Y. 230; *Howard v. State*, 32 Ind. 478; *Melhuish v. Collier*, 15 Q. B. 878.

The New York courts have indulged an inclination in favor of the views above expressed, and in the case of the *Metropolitan Nat. Bank v. Hale*, 28 Hun, 341, it was held that if the witness is against the party calling him, in feeling and interest, the party is not bound to accept as unqualifiedly true the first answer given, but may pursue the inquiry further, and conduct the examination as he would a cross-examination.

The decisions have exercised a moulding influence in the development of an important subdivision of the law of evidence. Certain doctrines are plainly derived from them, as their chief, though not, perhaps, their only source of inspiration. Full scope and effect of such an important invasion of a venerated and time-honored rule of evidence can only be understood by a clear perception of the relations which connect these recent utterances of the courts with the early reasoning which formulated the contrary rule.

Counsel conducting a direct examination should carefully avoid traveling outside of the affirmative case, by attempting to anticipate the defense, as the opposite course may enable the adverse party on cross-examination to draw out testimony material to the defense without overstepping the bounds of legitimate cross-examination, or forfeiting the latitude allowed thereon. Baylies' Trial Pr. 176.

### § 236. Impeachment of Witnesses.

**a. Universality of Rule Allowing.**—It is axiomatic that, under the rules of evidence recognized and established in this country, a witness may be cross-examined as to specific facts, that if disclosed would tend to discredit him. This is an inexorable corollary of the relaxed rules under which competency has been accorded to all persons, but there must be incessant apprehension

of the wide distinction between the competency of witnesses and their credibility. Modern legislation, the juridical sentiment of the entire country, the disclosures of the underlying equities of every controversy, all these demand more light, and the removal of every obstruction that has impeded the progress of light; hence the policy of the modern law will place within the witness-box every gradation of character without the least reference to social, moral or intellectual or monetary status,—but there she leaves him as legitimate prey to whatever depredations the ingenuity of counsel may inflict touching his moral sense. Anything in the way of a question which has a tendency to impair or subvert his credibility is permissible, and counsel may flay, excoriate and pillory, by legitimate comment and warrantable scorn, the reputation and name of one who, offering himself as a witness, is shown to have fallen by crime, inebriation and lust into such incredible depths of infamy as to be utterly unworthy of belief, even when under the solemnities of an oath.

Such questions calculated to produce such a result are always relevant, and the extent to which they may be indulged is a matter entirely within the discretion of the trial court. *Gutterson v. Morse*, 58 N. H. 165; *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42; *Rusling v. Bray*, 37 N. J. Eq. 174; *Marx v. Hilsendegen*, 46 Mich. 336; *Muller v. St. Louis Hospital Asso.* 73 Mo. 242; *Player v. Burlington, C. R. & N. R. Co.* 62 Iowa, 723; *South Bend v. Hardy*, 98 Ind. 577.

It is always competent to show that a witness produced upon the trial of an action is hostile in his feelings toward the party against whom he is called to testify, or that he entertains malice toward that party, or even ill will or prejudice. *Long v. Lamkin*, 9 Cush. 365; *Collins v. Stephenson*, 8 Gray, 438; *Drew v. Wood*, 26 N. H. 363; *Hutchinson v. Wheeler*, 35 Vt. 340; *Atwood v. Welton*, 7 Conn. 71.

**b. What Necessary to Show Witness.**—Where a party proposes to impeach a witness by proving inconsistent written statements, it is sufficient to show the witness or read to him the paper, and if its genuineness is admitted, the party can introduce it when he has the case and the right to put in evidence; and it is not the legal right of the other party or the witness to enter into any explanation of the contents of the paper until after it has been introduced in evidence. It is within the discretion of the court,



however, to vary the order of proof. *Romertze v. East River Nat. Bank*, 49 N. Y. 577.

**c. Views of Chief Justice Church.**—*Chief Justice Church*, in the course of a singularly able opinion in the case last cited, throws an illumination on this subject that dispels all obscurity. "It is said that the letter should have been introduced in evidence at the time, so that the witness might either explain his evidence or the statements contained in the paper. Without determining whether the court might, in its discretion, permit that course, the orderly way was to withhold the paper until the other party rested and he took the case. The witness could then be recalled and make any explanation he might have. Neither his rights nor that of the party would have been interfered with by this course. In case of oral declarations out of court, the contradicting witnesses are never called until the party proposing to introduce them has the right to produce evidence on his part, and the explanations of the witness sought to be impeached are usually given after that, although the court may sometimes vary the order of evidence as a matter of discretion. The rule is substantially the same in both cases, except as it is necessarily varied by the nature of the impeaching evidence. As to oral declarations, the attention of the witness must be called to the time and place and particular language used, in order that he may recall the circumstances and make an intelligent answer, but as to written statements, this is unnecessary, when the witness is shown the paper itself, and admits that he wrote or signed it and knows its contents. The rule indicated preserves the orderly course of the trial, and does no injustice to the witness or either party, and such I understand to be the rule sanctioned by authority."

**d. Not Concluded by Unfavorable Testimony.**—It is a well established rule of evidence in both civil and criminal actions that a party is not concluded by the unfavorable testimony of his witness, but may prove his case by other evidence. He is not precluded from proving any fact relevant to the issue, by any competent evidence, though it be a direct contradiction of the testimony of a former witness called by him. And generally, where a witness is an unwilling one, or hostile to the party calling him, or stands in a situation which makes him necessarily adverse to the party, his examination in chief may be allowed to assume something of the form and character of a cross-examination, at

least to the extent of allowing leading questions to be put to him. *Hurley v. State*, 4 L. R. A. 161, 46 Ohio St. 320.

Sometimes rather loose language has been indulged in to the general effect that a party cannot impeach his own witness, but when an examination is made as to the limits of the rule, the result will be found to be that the result only prohibits this impeachment in three cases, viz: 1. the calling of witnesses to impeach the general character of the witness; 2. the proof of prior contradictory statements by him; and 3. a contradiction of the witness by another, when the effect is only to impeach and not to give any material evidence upon any issue in the case. *Lawrence v. Barker*, 5 Wend. 301-305; 2 Stark. Ev. (9th Am. ed.) 244-250.

The State cannot impeach her own witness (*Quinn v. State*, 14 Ind. 589); but it has been held in North Carolina that the attorney-general may introduce evidence to discredit a witness for the Commonwealth. *State v. Norris*, 1 Hayw. (N. C.) 438; *Queen v. State*, 5 Harr. & J. 232; 1 Roscoe, Crim. Ev. 159.

Texas Code of Criminal Procedure, art. 755, provides that "The rule that the party introducing the witness shall not attack his testimony is so far modified that any party, when facts stated by the witness are injurious to his cause, may attack his testimony in any manner, except by proving his bad character;" but before this rule can be applied, the witness must have stated some fact in evidence which was injurious to the party in whose behalf he was testifying, and it is not sufficient that he merely made a statement different from that which the party had reason to, and did believe, he would make. *Bennett v. State*, 24 Tex. App. 73.

**e. Proof of Statements Inconsistent with Present Testimony.**—Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether has made any former statements relative to the subject matter of the action, and inconsistent with his present testimony, the circumstances of the supposed statements being sufficiently referred to to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it. Stephen, Dig. art. 131.

The above paragraph states the familiar rule in force throughout this country, and which is enforced with practical unanimity by both the civil and the criminal courts. To authorize proof of previous acts or declarations of a witness for the purpose of inval-

idating his testimony, the witness must, previous to the introduction of such evidence, be examined as to the matter.

**f. Witness May Explain Inconsistencies.**—A witness should always be allowed to explain what he has said or done concerning the matter under investigation, otherwise his reputation might suffer wrongfully. If his attention is not called, by cross-examination, to the supposed contradiction, he will have no opportunity to explain supposed contradictions or errors, by making more full statements, or showing the connection of things, or defining his meaning of expressions and the terms he may have used. No man always conveys his ideas in the same language. Many even of the most learned, fail to express themselves clearly and properly. In such case, a few explanatory words may reconcile seeming contradictions. It would be unjust that the party should suffer where he has no means of giving an explanation, which may be most ample and cruel to a witness to discredit him, thereby injuring his character without allowing him to show that he has committed no fault. Hence the rule that contradictory statements and acts of an inconsistent character cannot be given in evidence, without preparing the way for its admission by cross-examining the witness as to the supposed contradictory statements.

**g. Witness's Attention Called to What.**—When a witness has been examined as to a particular transaction, if the other side were permitted to give in evidence declarations made by him respecting those transactions, at variance with his testimony, without first calling the attention to those declarations, and refreshing his memory with regard to them, it would, as has been observed, have an unfair effect upon his credit.

In *The Queen's Case*, 2 Brod. & B. 312, Abbott, *Ch. J.*, said: "If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation or exculpation of his conduct, if any there may be, as the particular transaction may happen to furnish.

In *Angus v. Smith*, 1 Mood. & M. 473, Tindal, *Ch. J.*, said: "I understood the rule to be that before you can contradict a witness by showing that he has at some other time said something inconsistent with his present evidence, you must ask him as to the time and place and person involved in the supposed contradiction."

Phil. Ev. (Cow. & H. notes) 774-775; *Williams v. Turner*, 7 Ga. 348; *Doe v. Reagan*, 5 Blackf. 217; *Johnson v. Kinsey*, 7 Ga. 438; *Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co.* 11 Gill & J. 28; *Palmer v. Haight*, 2 Barb. 210, 213; *McKinney v. Neil*, 1 McLean, 540; *Moore v. Bettis*, 11 Humph. 67; *United States v. Dickinson*, 2 McLean, 325; *Chapin v. Siger*, 4 McLean, 378-381; *Weinzorpfli v. State*, 7 Blackf. 186; *Cheek v. Wheatly*, 11 Humph. 556; *Beebe v. DeBaun*, 8 Ark. 510; *Clementine v. State*, 14 Mo. 112; *Regnier v. Cabot*, 7 Ill. 34; *King v. Wicks*, 20 Ohio, 87.

In *Carpenter v. Wall*, 11 Ad. & El. 803, Denman, *Ch. J.*, the other judges concurring, said: "When words are to be proved as having been uttered by a witness, it is always expected that he shall have an opportunity to explain." *Reg. v. St. George*, 9 Car. & P. 483; *Johnston v. Todd*, 5 Beav. 600-602, cited in 1 Greenl. Ev. 581; *Conrad v. Griffey*, 52 U. S. 11 How. 480, 13 L. ed. 779.

In *Everson v. Carpenter*, 17 Wend. 419, referring to the requisites for admitting a written instrument by way of contradiction, Cowen, *J.*, said: "It was introduced with the proper preliminary question to the witness, whether he had made the indenture and the representation about to be imputed to him. He answered with such explanations as occurred to him. Here was all the precaution required by this kind of examination by *The Queen's Case* and others."

**h. Examination by Commission or Deposition.**—In *Kimball v. Davis*, 19 Wend. 437, Nelson, *Ch. J.*, considered this question at length, in a case where the defendant offered to prove that witnesses who had been examined under a commission had subsequently made statements contradicting their written testimony. The marginal note of this decision is in these words:

"The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the testimony, is inadmissible in evidence, if objected to; the only way for a party to avail himself of such declarations is to sue out a second commission; such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached has been examined upon the point and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This case went to the Court of Errors, and is reported in 25 Wend. 259, where it was affirmed. Walworth, *Chancellor*, there said: "I concur with the supreme court in the opinion that it was improper to give the declarations of the witnesses in evidence without giving them, in the first place, an opportunity to explain; and the fact that the witnesses had been examined under a commission did not prevent the operation of the principle upon which the rule is founded."

Edwards, *Senator*, said he was satisfied with *Chief Justice Nelson's* reasoning on this question.

"The rule that witnesses cannot be contradicted by proof of previous counter declarations, either written or verbal, applies to testimony taken by depositions, and if such supposed contradictory declarations exist at the time the deposition is taken, the witness must have an opportunity afforded him of explaining it, if in his power." The reason of the rule is, that he may have it in his power to explain the apparent contradiction, and the rule is the same, whether the declarations of the witness supposed to contradict his testimony be written or verbal (3 Stark. Ev. 1741). "The question is usually made when the witnesses are examined orally in open court, and in our opinion it must also apply to testimony taken by deposition, as the deposition is a mere substitute for the witness; and we can perceive no reason why the witness testifying in this should not be entitled to the same protection as if he had testified orally, in the presence of the court and jury. If this paper existed when the plaintiff was notified that the deposition of the witness was to be taken, and was informed by the interrogatories of the testimony the witness was expected to give, it was his duty to give him an opportunity of explaining it, if he could, and reconciling it with the evidence he then gave, if there was any real or apparent contradiction between them." *Howell v. Reynolds*, 12 Ala. 128.

**i. The Settled Rule.**—The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. *The Queen's Case*, 2 Brod. & B. 312; *Angus v. Smith*, 1 Mood. & M. 473; 3 Stark. Ev. 1740, 1753, 1754; *Carpenter v. Wall*, 11 Ad. & El. 803.

The rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

**j. General Rule in this Country.**—The rule is generally established in this country as in England. *Doe v. Reagan*, 5 Blackf. 217; *Franklin Bank v. Pennsylvania, D. & M. Steam Nav. Co.* 11 Gill & J. 28; *Palmer v. Haight*, 2 Barb. 210–213; *McKinney v. Neil*, 1 McLean, 540; *United States v. Dickinson*, 2 McLean, 325; *Chapin v. Siger*, 4 McLean, 378, 381; *Jenkins v. Eldredge*, 3 Story, 181–284; *Kimball v. Davis*, 19 Wend. 437, 25 Wend. 259.

Where witness proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of the opinion that in general, evidence is not admissible in order to confirm his testimony, to prove that at other times he has given the same account that he has under oath; for it is his mere declaration of the fact, and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath, and the repetition of his assertions does not carry his credibility further, if so far as his oath. We say in general, because there are exceptions; but they are of a peculiar nature, applicable to circumstances that seldom arise; as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted. It is true that in *Lutterell v. Reynell*, 1 Mod. 282, it was held that though hearsay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony to show that he affirmed the same thing upon other occasions, and that he is still constant to himself. Lord Chief Baron Gilbert has asserted the same opinion in his treatise on Evidence (page 135). But Mr. Justice Buller in his *Nisi Prius* Treatise (page 294), says: "But clearly it is not evidence in chief; and it seems evident whether it is so or not." The same question came before the House of Lords in the *Berkeley Peerage Case*, 8 H. L. Cas. 21, and it was there said by Lord Redesdale that he had always understood that for the purpose of impugning the testimony of a

witness, his declarations at another time might be inquired into, but not for the purpose of confirming his evidence. *Lord Eldon* expressed his decided opinion that this was the true rule to be observed by the counsel in the cause. *Lord Chief Justice Eyre*, is also represented as having rejected such evidence when offered on behalf of the defendant in a prosecution for forgery. We think this is not only the better but the true opinion, and well founded on the general principles of evidence. There is this additional objection to the admission of confirmatory evidence, that it may be of subsequent declarations, which he was conscious that he had made, and which he might now have a motion to qualify, or weaken or destroy. *Ellicott v. Pearl*, 35 U. S. 10 Pet. 412, 9 L. ed. 475.

The statement which you seek to draw out on cross-examination with a view to show a contradictory statement by the adverse witness in respect to it, must not only relate to the issue, but it must be a matter of fact, and not merely a former opinion of the witness in relation to the matter in issue, inconsistent with a different opinion which now appears to be warranted by his testimony; for example, a statement of the witness that, in his opinion the party for whom he is testifying, had not a leg to stand on in the case. *Elton v. Larkins*, 5 Car. & P. 385.

But it is otherwise where the opinion of the witness (*e. g.* as to the value) is admissible in evidence, he may be cross-examined as to any previous contradiction in his opinion; and if he deny that he may be discredited by showing the fact. *Daniels v. Conrad*, 4 Leigh, 401, 405, 406.

The transaction inquired about must be relevant. A witness is not to be cross-examined as to a distinct collateral fact for the purpose of afterwards impeaching his testimony. *Lawrence v. Barker*, 5 Wend. 301, 303, 305.

In general whenever a fact would be relevant as affecting the credit of the witness, and might be inquired of upon cross-examination, the same effect may be shown to impeach his credit where he is absent, having made a deposition (*Daggett v. Tallman*, 8 Conn. 169, 177, 178); but not collateral matters. *United States v. White*, 5 Cranch, C. C. 38.

Where the credit of a witness is impeached by proof that he has made declarations inconsistent with what he has sworn to, in reply to such evidence, proof of his declarations on other occasions, consistent with what he has sworn to, is admissible. *Lyles*

*v. Lyles*, 1 Hill, Eq. 77. But see *Hotchkiss v. Germania F. Ins. Co.* 5 Hun, 90; *Herrick v. Smith*, 13 Hun, 446.

Nor is evidence of good character admissible to sustain in such a case. *Hannah v. McKellip*, 49 Barb. 342; *Frost v. McCargar*, 29 Barb. 617.

The rule that a party cannot discredit his own witness by proving that he had made contradictory statements at other times (*United States v. Jones*, 3 Wash. C. C. 209); does not apply to those cases where the party is under the necessity of calling the subscribing witnesses to an instrument. *Dennett v. Dow*, 17 Me. 19.

In order to impeach a witness, in order to prove that he has, out of court, made declarations or statements inconsistent with, or contradictory of his testimony, the witness must first be asked, upon cross-examination, regarding such contradiction. Unless this has been done, it is incompetent to prove such statements or declarations. *Conrad v. Griffey*, 57 U. S. 16 How. 38, 14 L. ed. 835; *McKinney v. Neil*, 1 McLean, 540; *United States v. Dickinson*, 2 McLean, 325; *Chapin v. Siger*, 4 McLean, 378; *Kimball v. Davis*, 19 Wend. 437; *Palmer v. Haight*, 2 Barb. 210; *Valton v. National Fund L. Assur. Soc.* 22 Barb. 9; *Van Cort v. Van Cort*, 4 Edw. Ch. 621, 6 L. ed. 997; *The Queen's Case*, 2 Brod. & B. 284; *Everson v. Carpenter*, 17 Wend. 419; *Clapp v. Wilson*, 5 Denio, 285; *Root v. Brown*, 4 Hun, 797; *Crane v. Hardman*, 4 E. D. Smith, 448; *Van Ness v. Bush*, 14 Abb. Pr. 33, 22 How. Pr. 481.

But in Connecticut it has been held that the credit of a witness may be impeached by proof that he has made statements out of court on the same subject, contrary to what he swears at the trial; without having inquired of the witness on cross-examination whether he had made such contradictory statements. *Hedye v. Clapp*, 22 Conn. 262; disapproving *The Queen's Case*, 2 Brod. & B. 310.

Also in Massachusetts, a witness may be impeached as to material matter, by proving different statements made by him out of court, either before or after trial, and it is not necessary first to ask him if he ever made such statements. *Tucker v. Welsh*, 17 Mass. 160.

A witness cannot be discredited by proving that he made a certain remark, which in his examination he does not deny, but cannot recollect. *Giltner v. Gorham*, 4 McLean, 402.



A witness may discredited by proof of inconsistent statements made out of court. *Harper v. Reily*, 1 Cranch, C. C. 100; *Briggs v. Wheeler*, 16 Hun, 583.

The attention of the witness must be called to the time and place, when and where, and the person to whom the alleged declarations were made, before the inconsistent declarations can be given in evidence. *Palmer v. Haight*, 2 Barb. 210.

But the name of the person is not necessary; it is enough if the attention of the witness had been directed to the time, place and circumstances of the alleged conversation, with reasonable certainty (*People v. Austin*, 1 Park. Crim. Rep. 154); nor is the time or place essential, where the occasion is clearly indicated by other circumstances. *Rockwell v. Brown*, 36 N. Y. 207.

Where the former contradictory statements are contained in a statement in writing, signed and sworn to by the witness, it is sufficient preliminary examination to show the paper to the witness and ask him whether the signature is his, without interrogating him as to the particular statements contained therein. *Clapp v. Wilson*, 5 Denio, 285; *Honstine v. O'Donnell*, 5 Hun, 472; *Bellinger v. People*, 8 Wend. 595; *Contra, Kimball v. Davis*, 19 Wend. 437; *Stacy v. Graham*, 3 Duer, 444.

A witness cannot be impeached by disproving irrelevant statements brought out on cross-examination. *United States v. White*, 5 Cranch, C. C. 38.

**k. Foundation Necessary to Impeach.**—After the attention of counsel cross-examining witness has been called to the rule that he cannot be impeached by evidence of statements out of court unless his attention has been called to the time and place, it is not abuse of discretion to refuse to allow the witness to be recalled, to lay the proper foundation or the impeaching testimony after an objection to the impeaching evidence. *Aneals v. People*, 134 Ill. 401.

No question, the object of which is to impeach the testimony of a witness, can be put, unless a foundation for it has been previously laid and the witness put on his guard. *State v. Johnson*, 41 La. Ann. 574.

In order to lay a sufficient foundation for the introduction of evidence to contradict the statement of a witness as to a statement alleged or denied by him, it is indispensable that the witness's attention be called with reasonable certainty to the declara-

tion and the time and place, when and where, and the person to whom it was made. *Wood River Bank v. Kelley*, 29 Neb. 590.

Before contradictory statements of a witness can be used to impeach him, his attention must first be called to the time, place, and the person to whom such statements were made. *Brown v. State*, 72 Md. 468.

**1. What may be Shown in Contradiction.**—A witness who on cross-examination has testified that he has never been arrested or convicted of crime, may be contradicted by court records showing that he has been tried and convicted of crime. The question as to whether or not a witness has been convicted of crime is not a collateral one in the sense that the party cross-examining him is bound by his answer. *Helwig v. Lascowski*, 10 L. R. A. 378, 82 Mich. 619.

A party who puts his adversary on the stand as a witness waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by the testimony of other witnesses inconsistent with his. *Helms v. Green*, 105 N. C. 251.

A witness for the purpose of discrediting him may be asked whether he has not been in the penitentiary. *State v. Miller*, 100 Mo. 606.

A witness interrogated as to a conversation, with the object of impeaching him, has a right to give the whole conversation so far as it is pertinent. *Savannah F. & W. R. Co. v. Holland*, 82 Ga. 257.

The rule permitting a party to contradict his own witness is statutory and applies only where the testimony given is a surprise to the party calling him and is prejudicial. *Miller v. Cook*, 124 Ind. 101.

A rule that a party calling a witness as his own cannot discredit his testimony by impeaching him, does not prevent him from proving the fact to be different from that which is stated by his own witness. *Blackwell v. Wright*, 27 Neb. 269.

A letter which a witness had previously written to another and which might fairly be construed as expressing a purpose to testify to a fabricated state of facts, is admissible to impeach him after he has testified to such facts. *State v. Tull*, 43 Minn. 273.

Evidence that an impeaching witness has had business dealings

with the other witness for many years is not a sufficient foundation for questions touching the other's reputation for truth and veracity, and as to whether he is entitled to belief under oath. *Healey v. Terry* (C. P.) 30 N. Y. S. R. 664.

Excessive use of opium may be always shown as tending to impair the credibility of a witness, but it is not ground for the exclusion of his testimony until it satisfactorily appears that he was under its influence when examined or when he states a certain fact to have occurred and attempts a narration of the occurrence. *McDowell v. Preston*, 26 Ga. 528.

The question of credibility of a witness under New York Penal Code, § 714, and New York Code Civ. Proc. § 832, is for the jury, even where discrepancies in the testimony are the result of deliberate falsehood. *People v. Chapleau*, 121 N. Y. 266.

A party who on cross-examination asks a witness an immaterial or irrelevant question is concluded by the answer and will not be allowed to call a witness to contradict it. *McDuff v. Bentley*, 27 Neb. 380; *Hussey v. State*, 87 Ala. 121; *Dimmitt v. Robbins*, 74 Tex. 441.

**m. Views of the United States Supreme Court.**—The foregoing considerations find ample support in the decisions of the United States Supreme Court, and as a guide to the practitioner in this maze of contradiction, we will cite the case of *Conrad v. Griffey*, 52 U. S. 11 How. 481, 13 L. ed. 779.

*Mr. Justice Woodbury* tabulates a careful review of the contradictory decisions, and the hopelessly discordant nature is made very apparent. He says: "So far as regards principle, one proper test of the admissibility of such statements is, that they must be made at least under circumstances when no moral influence existed to color or misrepresent them (1 Greenl. Ev. § 469, 2 Pothier, Obl. 289, 1 Stark. Ev. 148, 1 Phil. Ev. 308); but when they are made subsequent to other statements of a different character as here, it is possible if not probable that the inducement to make them is for the very purpose of counteracting those first uttered. 10 Pet. 440. This impairs their force and credibility, when, if made before the others, they might tend to sustain the subsequent evidence corresponding with them. 23 Wend. 52, 2 Phil. Ev. 446, 1 Greenl. Ev. 469. When made in either way they are admissible only to sustain the credit of the witness impugned,

and not as *per se* proof of the facts stated, and hence, if made under oath, as here, but not in legal form as a deposition, between these parties, they are none the more admissible, except if prior in date, they might help to sustain the witness's credit. 10 Pet. 412; *King v. Ereswell*, 3 T. R. 721. In this case, then, not having been made prior in time, they do not appear on principle or precedent to be competent."

The weight of authority sustains the proposition that a party cannot impeach either by general evidence or by proof or contradictory statements out of court, a witness whom he has presented to the court as worthy of credit. He may contradict him as to a fact material in the case, although the effect of that proof may be to discredit him. But he cannot adduce such a contradiction when it is only material as it bears upon his credibility. A witness may be impeached by the party against whom he was called, but before this can be done, if it be on the ground of inconsistent statements made at different times, the supposed statements must be referred to sufficiently to designate the particular occasion, and he must be asked whether he has made such statements, and if so be allowed to explain them.

**n. Views of the New York Supreme Court.**—The late *Chief Justice* Church held in a well considered case that to lay the foundation for contradiction, it is necessary to ask the witness specifically, whether he has made such statements; and the usual and most accurate mode of examining the contradicting witness is to ask the precise questions put to the principal witness. Otherwise hearsay evidence not strictly contradictory might be introduced to the injury of the party, and the subversion of legal rules. The practice, however, upon this subject, is to a great extent under the control and discretion of the court, and this fact the distinguished judge was particular to indicate. *Sloan v. New York Cent. R. Co.* 45 N. Y. 125.

**o. When Character Alone is in Question.**—In the impeachment of witnesses, it is general character alone that is in question; and therefore, specific acts of immorality on the part of a witness cannot be given in evidence to impair his credibility. *Boon v. Weathered*, 23 Tex. 675; *Crabtree v. Kile*, 21 Ill. 180; *Dimick v. Downs*, 82 Ill. 570; *Moreland v. Lawrence*, 23 Minn. 84; *Leverich v. Frank*, 6 Or. 212; *Bakeman v. Rose*, 18 Wend. 146.

In the case last cited the *Chancellor* (Walworth) held that it was incompetent to inquire whether the witness had the general reputation of being a prostitute, although such proof would have a tendency to impair the moral status of a witness, and tend to impeach her veracity. The inquiry must be general in its scope and tendency.

A witness may be asked on cross-examination, for the purpose of discrediting his testimony, and laying a foundation for impeachment, whether he had not, on a previous occasion, made a collateral agreement with or proposition to another party for a consideration to suppress the very testimony given in the case. Such evidence does not fall within the rule that a witness cannot be impeached by evidence of particular wrongful acts not bearing upon the matter in issue, nor within the rule that a witness cannot be impeached in regard to a purely collateral matter. *Barkly v. Copeland*, 86 Cal. 483.

It is not permissible to impeach a witness by contradicting his statement in regard to a purely collateral matter brought out on cross-examination; and in an action for slander, committed in charging that plaintiff participated in a theft, where the convicted thief, on cross-examination by the plaintiff's counsel, testified that he was told by a third person while under arrest that the whole matter of the stealing had been settled, and that plaintiff's name was mentioned in the conversation, such third person cannot be called for the plaintiff to contradict the statement thus brought out. *Ibid.*

A witness cannot be impeached by evidence of specific wrongful acts, for the purpose of showing that the witness is destitute of moral qualities; nor can he be examined on cross-examination as to such acts. *Ibid.*

**p. Number of Impeaching Witnesses.**—A close scrutiny of the authorities, while by no means satisfactory, reveals the fact that the court by previous notice to the parties may limit the number of the impeaching and supporting witnesses to a definite number on each side. It seems to be a matter of discretion with the court with which the appellate jurisdiction will not interfere, unless through an improvident exercise of the discretion. *Bunnell v. Butler*, 23 Conn. 65.

**q. The English Rule.**—The controlling regulations which affect this subject when applied to controversy before the English

courts is well expressed in articles 132, 133, of Stephen's Digest. They having been recognized in this country as a substantial embodiment of the existing law and having an extensive application and manifest pertinency to this discussion, I append the following:

"A witness under cross-examination (or a witness whom the judge, under the provisions of article 131 has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony) may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him (or being proved in the first instance); but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The judge may, at any time during the trial, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.

"The credit of any witnesses may be impeached by the adverse party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.

"No such evidence may be given by the party by whom any witness is called, but when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit."

**r. Further Views on This Subject.** —Where evidence of contradictory statements by a witness is offered to impeach his veracity, evidence that on other occasions he has made statements similar to what he has testified in the cause is not admissible; unless where a design to misrepresent is charged upon the witness in consequence of his relation to the party, or to the cause, or from some motive; in which case it seems, it may be proper to show that he made a similar statement before the relation or motive existed. 2 Phil. Ev. 445, 446; 1 Stark. Ev. 187; *State v. De Wolf*, 8 Conn. 93; *King v. Parker*, 3 Dougl. 242.

The above exception to the rule has been approved of in several decisions; as where the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. *Railway Pass. Assur. Co. v. Warner*, 62 N. Y. 651; *Robb v. Huckley*, 23 Wend. 50.

In considering the various subdivisions under the topic of impeachment and credibility of witnesses, it must be remembered that the rules of evidence have undergone considerable fluctuation and are far from being harmonious. It differs in different states, and has occasionally changed in the same State.

**s. Inquiry as to Character and Time.**—An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time—sufficient at least to enable him to gather the general estimation in which he is held in the community in which he resides. *Curtis v. Fay*, 37 Barb. 64; *State v. Boswell*, 2 Dev. L. 209; *People v. Rector*, 19 Wend. 569.

Particular facts cannot be inquired into. A witness is never permitted to speak of his knowledge of particular facts from which he draws an opinion of the witness examined. Particular instances of want of veracity or destitution of moral principle or particular immoral conduct is not admissible. *Anonymous*, 1 Hill (S. C.) 257; *Jackson v. Lewis*, 13 Johns. 504; *Evans v. Smith*, 5 T. B. Mon. 364; *State v. Collins*, 3 Dev. L. 117; *Kimmel v. Kimmel*, 3 Serg. & R. 336; *Wike v. Lightner*, 11 Serg. & R. 198; *Rex v. Hodgson*, Russ. & R. C. C. 209; *Rex v. Clarke*, 2 Stark. 241; *Greaton v. Smith*, 1 Daly, 380; *Patriotic Bank v. Coote*, 3 Cranch, C. C. 169; *United States v. Masters*, 4 Cranch, C. C. 479; *United States v. White*, 5 Cranch, C. C. 38; *Corning v. Corning*, 6 N. Y. 97; *Varona v. Socarras*, 8 Abb. Pr. 302.

General character for drunkenness is not admissible (*Brindle v. M'Ilvaine*, 10 Serg. & R. 282); nor that the witness has been indicted, no conviction having followed (*Jackson v. Osborn*, 2 Wend. 555); nor that he has heard witness accused of petit larceny. *Barton v. Morphey*, 2 Dev. L. 520.

The scope of the inquiry seems to be: 1. What is the general

character of the witness? 2. What is his general character for veracity? 3. Is he to be believed under oath from his general character? General character and common reputation must never be departed from, though the question need not be restricted to an inquiry as to truth and veracity. *Wike v. Lightner*, 11 Serg. & R. 199; *Noel v. Dickey*, 3 Bibb, 268; *Blue v. Kirby*, 1 T. B. Mon. 195; *Hume v. Scott*, 3 A. K. Marsh. 260; *State v. Stallings*, 2 Hayw. 300; *State v. Boswell*, 2 Dev. L. 209; *Anonymous*, 1 Hill (S. C.) 251, 258, 259; *People v. Mather*, 4 Wend. 257, 258; 1 Stark. Ev. 146; 1 Phil. Ev. 212; *Rex v. Bispham*, 4 Car. & P. 392; *Fulton Bank v. Benedict*, 1 Hall (N. Y.) 480.

The impeaching witness may be cross-examined as to the grounds of his opinion, and how long the unfavorable reports have prevailed, and from what particular individuals he heard them, and as to his opportunity of knowing the character of the impeached witness. *State v. Boswell*, 2 Dev. L. 212; *Fulton Bank v. Benedict*; *People v. Mather*, *supra*; *Lower v. Winters*, 7 Cow. 265; *Bakeman v. Rose*, 18 Wend. 146.

The general character of the impeaching witness may be assailed in the same way as that of the witness sought to be discredited. *Noel v. Dickey*, 3 Bibb, 268; *Starks v. People*, 5 Denio, 106.

The character of a witness may be impeached by persons in whose neighborhood the attacked witness has resided until within four years of the trial, though they know nothing of the character borne by the witness at the place to which he had removed. *Sleeper v. Van Middlesworth*, 4 Denio, 431.

The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a period of five years, has so reformed as to have acquired an unimpeachable reputation since that time. *Rathbun v. Ross*, 46 Barb. 127.

The inquiry is not, in its nature, limited as to time. *People v. Abbott*, 19 Wend. 192.

The law lays down no certain limit to inquiries as to the general reputation of a witness. A limitation to a period of five years before trial, held to be error. *Stevens v. Rodger*, 25 Hun, 54.

A person is not a competent witness to testify to the general character of another witness unless he knows it. It is not sufficient that he has heard a number of people, on a single occasion, speak ill of such witness, without proof that they knew his character; but the knowledge to make him competent must be ac-



quired by time and by the general speech of people who know or have had an opportunity to know and form an opinion. *Cheritree v. Roggen*, 67 Barb. 124.

To discredit a witness it is not competent to prove general bad character disconnected with the inquiry concerning his veracity. *United States v. Vansickle*, 2 McLean, 219; *United States v. Dickinson*, 2 McLean, 325; see *Teese v. Huntingdon*, 64 U. S. 23 How. 2, 16 L. ed. 479.

The usual questions asked in United States courts to discredit a witness are: What is the witness' general reputation for truth? Is it good or bad? *Gass v. Stinson*, 2 Sumn. 605.

It is not improper to ask the person on the stand, what is the general "reputation" for truth of the witness sought to be impeached. It is even more proper than to ask what is his general "character" for truth. *Knode v. Williamson*, 84 U. S. 17 Wall. 586, 21 L. ed. 670.

The question as to whether a witness is impeached or not is for the jury to answer; and though he swore differently on a former trial if this was done under duress of bodily harm it may not affect his testimony. *United States v. Hall*, 10 L. R. A. 324, 44 Fed. Rep. 864.

Where a witness is sought to be impeached by proof of contradictory statements in the matters material to the issue, it must appear that the contradictory matter is material. *United States v. Lancaster*, 10 L. R. A. 333, 44 Fed. Rep. 896.

Questions designed to test the accuracy of a previous statement of a witness and his intelligence and integrity touching the matters under investigation are permissible on cross-examination. *Long v. North British & M. Ins. Co.* 137 Pa. 335.

Excluding questions touching reputation for truth and veracity and as to whether one is entitled to belief under oath, is discretionary where the preliminary question whether the impeaching witness knows the general reputation of the other, has not been asked. *Healey v. Terry* (C. P.) 30 N. Y. S. R. 664.

The court may in its discretion allow a party surprised by adverse or evasive testimony from his own witness, to ask him whether he had not previously stated the facts contrary to testimony, if the circumstances justify the belief that the witness is hostile and unwilling to tell the truth. *State v. Tall*, 43 Minn. 273.

### § 287. Exclusion of Evidence to Contradict Answer.

**a. When Contradiction Proper.**—When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him, except in the following cases:

1. If a witness has been asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.

2. If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted. *Stephen*, Dig. art. 130.

A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence. *Elton v. Larkins*, 5 Car. & P. 385; *Atty-Gen. v. Hitchcock*, 1 Exch. 91-99; *Hildeburn v. Curran*, 65 Pa. 59-63.

When a proper question calls out an irresponsive answer, an exception does not lie, even if the answer is improper: the answer may be stricken out. *Travis v. Burger*, 24 Barb. 614.

A party having cross-examined a witness as to immaterial matters is bound by his answers, and it is error to allow a contradiction. 2 Taylor, Ev. 1243; *Winton v. Mecker*, 25 Conn. 456; *Fletcher v. Boston & M. R. Co.* 1 Allen, 9; *State v. Staley*, 14 Minn. 105. His evidence on those points being collateral is conclusive and cannot be contradicted. *Hunt, Ch. J.*, in *Gandolfo v. Appleton*, 40 N. Y. 533.

The rule is stated with admirable precision by *Judge Rapallo* in *Furst v. Second Ave. R. Co.* 72 N. Y. 542.

“If the conductor had on his direct examination testified that the driver did look out, or that he was driving carefully at the time of the accident, it would have been competent to show that the witness had made statements out of court contradictory of, or inconsistent with his testimony, and if he denied having made such statements, it would have been competent to prove them by other witnesses.”

**b. Contradiction of Witness on Collateral Matter in Cross-Examination.**—The rule above outlined is admirably expressed by *Chief Justice Hunt* in *Gandolfo v. Appleton*, 40 N. Y. 533:

“It was inadmissible to impeach the defendant’s witness, G., as the plaintiff was bound by his answer on cross-examination as to what he had heard said by a third person, not a party or witness, it being a collateral fact.” To enforce or recognize any other rule would complicate the issues, and lead to an interminable collateral investigation of topics entirely foreign to the case and in no way raised by the pleadings. The proposition above noted is sustained by the following authorities: *Spencely v. De Willott*, 7 East, 108; *Rex v. Watson*, 2 Stark. 149; *Baker v. Baker*, 3 Swab. & T. 213; *Tennant v. Hamilton*, 7 Clark & F. 122; *United States v. Dickinson*, 2 McLean, 325; *United States v. White*, 5 Cranch, C. C. 38; *United States v. Neverson*, 1 Mackey, 152; *Ware v. Ware*, 8 Me. 42; *State v. Kingsbury*, 58 Me. 239; *State v. Reed*, 60 Me. 550; *State v. Benner*, 64 Me. 267; *Lewis v. Barker*, 55 Vt. 21; *Tibbetts v. Flanders*, 18 N. H. 284; *Seavy v. Dearborn*, 19 N. H. 351; *State v. Thibault*, 30 Vt. 100; *Com. v. Buzzell*, 16 Pick. 153; *Com. v. Farrar*, 10 Gray, 6; *Davis v. Keyes*, 112 Mass. 436; *Kaler v. Builders Mut. F. Ins. Co.* 120 Mass. 333; *Eames v. Whittaker*, 123 Mass. 342; *Com. v. Dunan*, 128 Mass. 422; *Learned v. Hall*, 133 Mass. 417; *Winton v. Meeker*, 25 Conn. 456; *Alling v. Cook*, 49 Conn. 574; *Schenley v. Com.* 36 Pa. 29; *Fogleman v. State*, 32 Ind. 145; *Cokely v. State*, 4 Iowa, 477; *Taylor v. Pickett*, 52 Iowa, 467; *Clark v. Reiniger*, 66 Iowa, 508; *Patten v. People*, 18 Mich. 314; *French v. O’Connor*, 39 Mich. 106; *State v. Staley*, 14 Minn. 105; *Tenny v. Mulvaney*, 8 Or. 513; *State v. Patterson*, 2 Ired. L. 346; *State v. Pulley*, 63 N. C. 8; *Clark v. Clark*, 65 N. C. 655; *State v. Elliott*, 68 N. C. 124; *McLeod v. Bullard*, 84 N. C. 515; *Wilkinson v. Davis*, 34 Ga. 549; *Central R. Co. v. Brunson*, 63 Ga. 504; *Dozier v. Joyce*, 8 Port. 303; *Rosenbaum v. State*, 33 Ala. 354; *Rocco v. Parczyk*, 9 Lea, 328; *People v. Devine*, 44 Cal. 452; *People v. McKeller*, 53 Cal. 65; *People v. Bell*, 53 Cal. 119; *Beckman v. Skaggs*, 59 Cal. 541; *Henderson v. State*, 1 Tex. App. 432.

The test of whether a fact inquired of in cross-examination is collateral is this: “Would the cross-examining party be allowed to prove it as a part of his case, tending to establish his plea?” *Sharswood, J., Hildeburn v. Curran*, 65 Pa. 63; and see *Atty-Gen. v. Hitchcock*, 1 Exch. 91; *Woodward v. Eastman*, 118 Mass. 403; *Briggs v. Hervey*, 130 Mass. 186; *State v. Patterson*, 74 N. C. 157. As to how far such contradictions may be extended at the discretion of the court, see *Powers v. Leach*, 26 Vt. 270. Answers

as to religious belief have been held collateral (*Clinton v. State*, 33 Ohio St. 27); and so in a prosecution for adultery statements denying criminal intercourse with a third person (*People v. Knapp*, 42 Mich. 267); but not statements under English statutes denying former conviction for another irrelevant offense. *Ward v. Sinfield*, 43 L. T. N. S. 252, 49 L. J. C. P. 696.

**c. What Questions not Collateral.**—Questions have been held not collateral which go to use of threats or revengeful language against a party (*Tyler v. Pomeroy*, 8 Allen, 480; *Gaines v. Com.* 50 Pa. 319; *Mimm v. State*, 16 Ohio St. 221); or to illicit sexual relations between witness and the party calling her (*Thomas v. David*, 7 Car. & P. 350); or to attempts of witness to tamper with evidence in the case. *Tullis v. State*, 39 Ohio St. 200. But see *Harris v. Tippet*, 2 Campb. 637. This limitation, however, only applies to answers on cross-examination. It does not affect answers to the examination in chief. *State v. Sargent*, 32 Me. 429; *Hastings v. Livermore*, 15 Gray, 10; *Whitney v. Boston*, 98 Mass. 312; Whart. Ev. § 559.

**d. Diversity in Reported Cases.**—There is an exasperating diversity in the decisions bearing upon this subject, and as a portion of this friction is largely attributable to statutory enactments, there is an indifferent prospect of its ever being harmonized. Whether questions respecting the motives, interest or conduct of the witness as connected with the cause, or with either of the parties, are irrelevant, is a point on which the authorities differ; but when we consider the broader question as to whether an answer given to the cross-examining counsel is binding and conclusive, unless it has a direct tendency to impair his credit, truth and veracity, the conflict of judicial authority becomes hopelessly variant and irreconcilable. It is exceedingly difficult to formulate a precise rule that can be applied indiscriminately to all combinations of facts, but the tenor and trend of adjudication, the weight of authority, the plausibility of the argument inclines toward the view adopted by the learned Barons of the English Exchequer. They intimated, in a tolerably decisive opinion, that a witness might be asked any question tending to impeach his impartiality, and that his answers might be contradicted by other witnesses. *Atty-gen. v. Hitchcock*, 1 Exch. 94.

In trying to mitigate hardships, courts sometimes illustrate the maxim, "that extreme cases are the quicksands of the law." *Ferguson v. Neilson* (R. I.) 9 L. R. A. 155.

## § 288. Form of the Inquiry.

a. **No Form of Words Prescribed.**—It is a little remarkable considering the great number of times the subject must have come under discussion that it is not incontestably settled, what is the precise form to be resorted to for the purpose of impeaching the general credibility of a witness. Although certain general principles in regard to this matter are very well established, yet, so far as I have looked, I find no two elementary writers on the subject of evidence, and scarcely any two judicial decisions to agree exactly in the form of words to be used, notwithstanding the means for determining the weight that should be given to a witness's testimony may often depend very much on the form in which the inquiry as to his general credibility is made. Phillips, in his treatise on Evidence, vol. 1, p. 145, quoting *Lord Ellenborough* in *Mawson v. Hartsink*, 4 Esp. 103, says the regular mode is to inquire of the witnesses "whether they have the means of knowing the former witness's general character, and whether from such knowledge they would believe him on his oath." But Swift, in his treatise on Evidence, p. 143, says: "The only proper question is whether he knows the general reputation of the witness in point of truth among his neighbors, and whether it is good or bad;" while Starkie, vol. 1, p. 145, asserts the only proper question to be "whether he would believe him upon his oath." In the courts of New York the forms prescribed by Swift, are believed to be most commonly adopted, and yet it is doubtful if this or any other form has been distinctly fixed by judicial decision. In *People v. Mather*, 4 Wend. 229, the court refers to the forms of the inquiry as given by Phillips and by Starkie, but without discriminating between them, or expressly sanctioning either. The consequence of this want of precision is a matter which, at first glance, would seem to be of very little importance, but it not only occasions frequent contentions at trials, but sometimes leads to serious injustice. If the inquiry be confined to the general reputation of the witness, in point of truth among his neighbors, it will happen in some cases that witness whose general moral character is deservedly infamous, is allowed to impress his testimony on the jury with unqualified weight, simply because mendacity may have been relatively too insignificant an item in the catalogue of his vices to have attracted the attention or elicited the remark of his acquaintances; or it may happen, that though generally of so depraved or

corrupt a life that no one would doubt the facility with which he might be suborned to swear falsely, yet from calculation or caution, he may have observed that general veracity in his general intercourse, or from natural taciturnity a "wilfull stillness entertained" which would render his reputation impregnable to this form of inquiry. On the other hand, a witness incapable of the total depravity of deliberate perjury, may have destroyed his general reputation for truth, by a habit of exaggerations, of heedless promises, of over-indulged levity, or other petty falseness, which, though immoral and highly censurable, do not necessarily denote that foul corruption of moral principle which is to be implied in one not worthy of any credit upon his oath.

b. **Lord Ellenborough's Rule.**—From these considerations, I prefer the form of inquiry sanctioned by *Ld. Ellenborough*, and which is given by Phillips, as less objectionable than the others, and perhaps as effectual to the object desired as any that can be proposed, and yet this possibly may admit of some useful qualifications; but that the credibility of a witness should be sought through his general moral character, I have no doubt. This has been settled in some of our sister States, particularly in North Carolina and Kentucky, where the question of whether the witness is of bad moral character has been allowed. *State v. Stallings*, 2 Hayw. 300; *Hume v. Scott*, 3 A. K. Marsh. 261. And everywhere, notwithstanding the technical embarrassments which are supposed to be in the way of such inquiry, the obvious good sense of it is continually urging it to be attempted, and in some form it is frequently accomplished. That the general moral character of witnesses will have naturally a considerable influence upon the credit of their testimony, is a fact which cannot be doubted. One of the great benefits of trial by jury was supposed to exist in the circumstance that the jury, being from the vicinage of the party and the witnesses, were better able to judge of the honesty and credibility. It would seem, therefore, in accordance with this principle, that under the modern form of impaneling juries, which do not in many cases afford to jurors the means of judging from personal knowledge of the character of witnesses, the measure of credit to be given to them, that as liberal a course for supplying this deficiency of knowledge should be allowed as would be compatible with the rights of the witnesses; for while the policy of the law is against extending the right to the absolute exclusion of testi-

mony, it should favor in the fullest degree practicable the means of ascertaining its just value.

**c. Rule Where Character of Witness is Doubtful.**—It has been expressly held that where the character of the witness is doubtful, but not sufficiently depraved to enable the impeaching witness to declare that he would not believe him under oath, the attempt at impeachment is ineffectual.

To show general bad character is immaterial, it must appear that his reputation for truth and veracity is worthless, and that he is not to be believed even when under the sanctities of an oath. *Gilbert v. Sheldon*, 13 Barb. 623.

After impeaching witnesses are shown to be acquainted with the general moral character of the person whose credit is assailed, and they declare it bad, the question of credit is then for the jury, under proper comments from the courts, without any inquiry of the discrediting witnesses as to whether they would believe him under oath. *Wright v. Paige*, 3 Keyes, 581.

The chaotic condition of this entire subject betrays us into a further attempt at elucidation.

**d. View of Judge Bockes.**—In the case last cited *Judge Bockes* discriminately reviews the judicial dicta to the date of that decision, (1867).

The learned judge is examining an exception interposed to a ruling of the trial court. He holds that circumstances attending the examination of a witness may, without countervailing proof, become so overwhelming as utterly to destroy his evidence. If his conduct and manner of testifying is insincere or reckless, and his statements improbable and contradictory, this would be enough to authorize the jury to discredit it. The action was one for slander where the allegation was that the defendant charged that the plaintiff kept a whore-house, such charge being synonymous with a charge of keeping a bawdy house or house of ill-fame, which is an indictable offense.

It seems that an attempt was made to impeach a witness produced by the defendant, by whom he sought to prove the justification of the slander. In fact, no justification of a slander whatever was shown by her, and the evidence was entirely immaterial on that issue.

On the question of impeachment, evidence was given showing that the general moral character of the witness was bad, and

that her general character for honesty and integrity was bad, also that she was reputed to be unchaste and to possess a disposition to steal; and that she kept a place for the sale of liquors, which was the resort of vile characters. The witnesses were not asked whether they would believe her on oath. No evidence was offered to sustain the witness, nor was any objection taken to the sufficiency or completeness of the impeaching testimony, until the summing up by the counsel to the jury, when it was insisted that the impeachment was ineffectual, in as much as no one was asked if they would believe the witness under oath. The court charged the jury that they would take into consideration the manner of the witness when testifying, the nature of her evidence, whether or not consistent, and also the evidence of the witness called to impeach her general moral character, and determine whether they would believe her statement; and that it was not necessary, under the circumstances of the case, in order to impeach her, that the witnesses who testified to her general moral character, should have been asked whether they would believe her under oath. To the latter clause of this charge the defendant's counsel excepted, and requested the court to charge, that inasmuch as it had not been proved that the witness, by whom her character was shown to be bad, would not believe her under oath, she was not impeached, and that the impeaching testimony in that behalf was of no force. The court declined so to charge. The learned judge was manifestly right, both in his charge and refusal.

As to the charge, it was not necessary under the circumstances of the case, to ask the impeaching witness whether they would believe her under oath, if indeed it be necessary under any circumstances, for the purpose of a successful impeachment. The attention of the jury was called to the conduct of the witness while under examination, her manner of giving evidence, its probability or consistency, from which we are to infer that these are proper subjects of remark; especially must we so infer, as there was no exception to this part of the charge.

Her conduct and manner of testifying was what might have been expected from a creature in her condition of life. It was not necessary therefore to the impeachment of this witness, that another should swear that he would not believe her under oath, nor was it any more necessary for the reason that several witnesses had also sworn that she was of notoriously bad moral character.



The judicial sentiment incorporated in this text, finds countenance and indorsement in *Sloan v. Edwards*, 61 Md. 89, and *Bogle v. Kreitzer*, 46 Pa. 465.

**e. Criterion in Impeachment Cases.**—From what is known of the witness's reputation for truth and veracity in the neighborhood in which he lived, can his averment or statement of any fact under oath be entitled to credit? This is the criterion in impeachment cases in most of the American jurisdictions. *Bogle v. Kreitzer*, 46 Pa. 465; *Sargent v. Wilson*, 59 N. H. 396; *Amidon v. Hosley*, 54 Vt. 25; *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Warner v. Lockerby*, 31 Minn. 421; *Hillis v. Wylie*, 26 Ohio St. 574; *United States v. Vansickle*, 2 McLean, 219; *Laclede Bank v. Keeler*, 109 Ill. 385; *Lenox v. Fuller*, 39 Mich. 268; *Teese v. Huntingdon*, 64 U. S. 23 How. 2, 16 L. ed. 479; *Shaw v. Emery*, 42 Me. 59; *State v. Randolph*, 24 Conn. 363; *Atwood v. Impson*, 20 N. J. Eq. 150.

In Indiana, Missouri, and Iowa, the general moral character of a witness may be shown to be bad, rather than his reputation for truth and veracity, and on this showing may be predicated his impeachment. *Walton v. State*, 88 Ind. 9; *State v. Grant*, 79 Mo. 113; *State v. Egan*, 59 Iowa, 636. California substantially follows New York. *People v. Markham*, 64 Cal. 157. In Illinois, where it is shown that the general character of the witness among his neighbors for truthfulness is bad, it is erroneous to refuse to let the impeaching witness answer, whether he would believe such witness upon oath. *Eason v. Chapman*, 21 Ill. 33. The knowledge of a witness's character must be derived from his general reputation, and not what an individual knows of his.

As has been shown, the credit of a witness may also be impeached by proof that he has made statements out of court on the same subject contrary to what he swears at the trial. In answer to such evidence, the party calling the witness may show that he has affirmed the same thing before on other occasions, and that he is still consistent with himself. The credibility of a witness may be affected by contradictory testimony, without showing that his statements are intentionally false or material to the issue. Proof that a witness has, on former occasions, made statements at variance with his testimony on the trial, has a direct tendency to impeach his veracity or his memory. In proving such previous statements, it is sufficient if their substance be shown. *Craig v. Rohrer*, 63 Ill. 325. The statements of a

witness are admissible when the object is to lay a foundation for impeaching him. Persons called to sustain the character of an impeached witness, are bound to swear that they know his general character for truth and veracity, otherwise they cannot be heard on the point. *Cook v. Hunt*, 24 Ill. 536.

A witness cannot be impeached by proof that he has made contradictory statements without first calling his attention to the time and place of making them. *Root v. Wood*, 34 Ill. 283; *Miner v. Phillips*, 42 Ill. 123; *Winslow v. Newlan*, 45 Ill. 145. But evidence is inadmissible to support the testimony of a witness by showing his good character, or the consistency between his former declarations and his evidence on the trial, unless he is first impeached. *Jackson v. Etz*, 5 Cow. 314.

**f. What Impeaching Witness must Show.**—In impeaching the credit of a witness, his general reputation is the subject of inquiry, not particular facts. The impeaching witness must be able to state what is generally said of the person to be impeached among his associates. *Crabtree v. Kile*, 21 Ill. 180. It is error to permit one witness to speak of the character of another, unless he knows what the general character of that other one is. *Ibid.* A party may show where a witness resided in a particular county for several years, that his character for truth was bad, although the witness may have been roving for several years preceding the trial at which his character was impeached. *Holmes v. Statelor*, 17 Ill. 453; *People v. Abbot*, 19 Wend. 192; *Sleeper v. Van Middlesworth*, 4 Denio, 431.

The want of recollection of one witness cannot rebut the positive testimony of another. *Gorham v. Peyton*, 3 Ill. 363.

The jury should not discredit a witness altogether, merely because he swears false in a single particular. The maxim *falsus in uno, falsus in omnibus*, should only be applied in cases where a witness willfully and knowingly gives the false testimony. *Brennan v. People*, 15 Ill. 516; *Chicago v. Smith*, 48 Ill. 107. It is error to tell the jury that if the witness has sworn falsely in one particular, his whole testimony must be rejected, for he may in other portions of his testimony be corroborated. *Blanchard v. Pratt*, 37 Ill. 243. If the part of the testimony of a witness is rejected as unworthy of belief, all of it must be rejected. Parts of sentences in a deposition cannot be detached and considered as true, and the residue of the testimony be rejected as not entitled to credence. *Farwell v. Meyer*, 35 Ill. 41. Where a witness is

shown to have willingly and knowingly testified falsely to a material fact, and there are no circumstances to corroborate his testimony; the jury will have the right to reject all the testimony; but they should not reject such portions of it as may be corroborated by other unobjectionable evidence. *Chicago & A. R. Co. v. Buttolf*, 66 Ill. 347; Haines' Treatise, 12th ed. (1887).

**g. What is Discretionary With the Court.**—It is within the discretion of the court to determine whether the question put to the impeaching witness relates to a period so remote as to make the answer immaterial and inadmissible. *Teese v. Huntingdon*, 64 U. S. 23 How. 2, 16 L. ed. 479; *Snow v. Grace*, 29 Ark. 131.

A witness who has never heard about the character of another witness until after the controversy arose is nevertheless competent to state what he knows about it. *Mask v. State*, 36 Miss. 77.

A witness is not incompetent as an impeaching witness merely because he has not heard the character of the witness sought to be impeached canvassed, if he knows the character of such witness (*Childs v. State*, 55 Ala. 28); but it would be otherwise if the witness only knows the individual and does not know his character. *Hadley v. State*, 55 Ala. 31.

**h. Summary of the Rule.**—In all these cases regarding the impeachment of a witness for want of veracity, the true object to be effected is to prove the witness's general character for truth to be bad. His general character in other respects is of no consequence. All experience shows that the general character of many men is bad, in the common acceptance of the word, while their veracity is unimpeachable. Indeed, most men term that man's general character bad, who has some one cardinal vice, although in other respects he may be irreproachable. In short, proof of general bad character, as that term is generally used and understood in society, does not necessarily and legally prove the fact that the witness's character for veracity is bad, and therefore, it is immaterial evidence, where the party avows his intention to stop with that question. All the elementary writers, in their formula of queries to the impeaching witness, indicate most clearly and decidedly, that further questions must be put, in order to render the impeachment effectual. *Gilbert v. Sheldon*, 13 Barb. 626-627.

When a party to the record is placed upon the stand, his credi-

bility may be impeached like that of any other witness, and his obvious interest in the event of the trial, might assist the presumption of bias. *Wright v. Hanna*, 98 Ind. 217; *People v. Beck*, 58 Cal. 212.

Inquiry as to facts affecting a witness's reputation, may be made at the time of the examination, or after that time, if not too remote. *Amidon v. Hosley*, 54 Vt. 25.

Judge Rapallo holds in a recent case that a sustaining witness may be cross-examined, his means of knowledge tested, and his credibility assailed. *Stape v. People*, 85 N. Y. 390.

END OF VOLUME I.













